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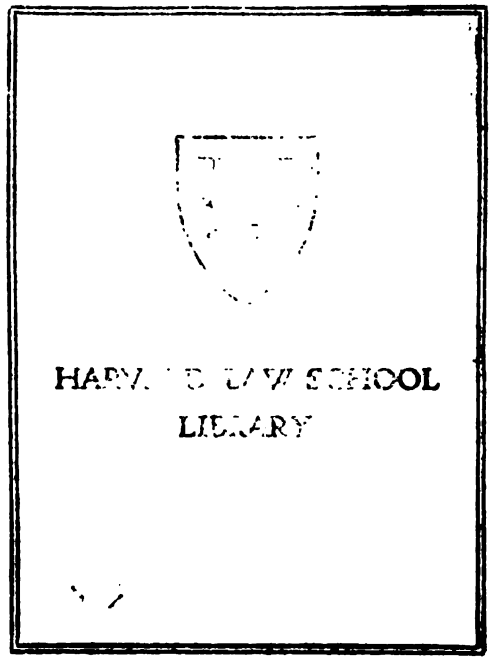
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PRACTICE REPORTS

IN THE

SUPREME COURT

AND

COURT OF APPEALS

OF THE

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PRACTICE REPORTS.

SUPREME COURT.

KNICKERBACKER agt. ALDRICH AND OTHERS.

By the true construction of the 399th section of the Code of 1851, the assignor of a thing in action shall not be admitted as a witness on behalf of any person deriving title through or from him, unless at least ten days notice of such intended examination of the assignor, specifying the points upon which he is intended to be examined shall have been given in writing to the adverse party.

The requirement of ten days notice is general, and applies to all cases in which "the assignor is to be examined in behalf of the party deriving title through him."

Saratoga General Term, January 1852—*Before* WILLARD, HAND, CADY and ALLEN, *Justices.*

By the Court, WILLARD, Justice.—This was a motion to set aside the report of a referee for irregularity. The action was brought by the plaintiff to recover an account for the work, labor and services of one Hamilton, done and performed for the defendants, and which had been assigned by Hamilton to the plaintiff. The defence was payment to Hamilton, and a set off as against him before the assignment.

On the trial the plaintiff introduced Hamilton as a witness to prove his account, and rested upon his evidence alone. The defendants not being personally present, but now residing in another state, an application was made for a stay of proceedings, to enable them to send a commission abroad to take their examination. This motion was refused, and a report made in favor of the plaintiff for the amount of the account. It appeared that no notice in writing had been given by the plaintiff's attorney to the defendants' attorney of his intention to examine the assignor

as a witness; and the only point finally insisted on was, that such examination could not be made, unless ten days previous notice in writing, specifying the points upon which he was intended to be examined, was given to the adverse party.

The 399th section of the Code under which the question arises, as it was amended in 1851, is obscurely framed. The section renders the assignor a competent witness in behalf of his assignee, but permits the adverse party, when the assignor is thus examined, to testify as a witness to the same matter in his own behalf. Thus far there is no room for mistake as to its meaning. The remaining sentence is so constructed that it is doubtful whether the ten days notice is an indispensable preliminary to the examination of the assignor in all cases, or whether it is only intended to be confined to those mentioned in that sentence. The cases mentioned in that sentence, are of actions brought by the assignee of one party against an assignee, or against the executor or administrator of the other contracting party. In these cases, beyond doubt, the assignor can not be examined, unless the other party to the contract is living, and his testimony can be procured, "nor unless at least ten days notice of such intended examination of the assignor, specifying the points upon which he is intended to be examined shall be given in writing to the adverse party." This part of the section may be illustrated by the following case: Suppose the assignee of the equity of redemption of mortgaged premises, brings his action against the assignee of the mortgagee, to compel satisfaction to be acknowledged, on the ground that the debt had been paid by the mortgagor. In this case, the plaintiff could not introduce the mortgagor as a witness to prove such payment, unless the mortgagee was living and his testimony could be produced; nor unless at least ten days notice thereof, specifying points, &c. should have been first given to the adverse party. If the mortgagee was dead, and the mortgage was vested in his executors or administrators, the plaintiff can not examine the mortgagor at all; because the title of the executor or administrator does not accrue till the death of the testator or intestate. The testimony of one of the parties to the contract can not in such case be produced, and therefore the other party shall not be permitted to testify in behalf of his

assignee. The policy of the section is, that the right of examination shall be reciprocal; and that ten days notice of such intended examination, shall be given by the one party to the other, and of the points to which the examination is to be directed, so as to avoid surprise. This is full as important in an action by the assignee against the other party to the contract, as where the action is brought against the assignee of such other party. The defendant can not know that his adversary will examine the assignor as a witness, unless he gives notice. The law does not require the parties personally to attend the trial. If the construction be given to the section, which dispenses with notice where the action is brought against a party to the contract, it will be necessary for parties always to attend in person on the trial, with their books and memoranda to refresh their recollection. If the last clause of the last sentence may be so construed as to qualify the right of calling the assignor in all cases, it will greatly mitigate the evil, if not remove it entirely. The sentence is elliptical. First the assignor shall not be admitted in an action against an assignee, &c. unless the other party to the contract is living and can be produced. This refers to a single class of cases. Second; nor shall such assignor be admitted, unless at least ten days notice, &c., specifying the points, &c. shall be given in writing to the adverse party. This is general, and applies to all cases in which this species of testimony is desired by either party. If this be not the construction, the last clause, requiring notice, is wholly inoperative, when the other party to the contract or thing in action is dead, or his testimony can not be procured. But by adopting this construction, full effect is given to every part of the section.

It is due to the Commissioners of Practice and Pleadings to say that they are not responsible for the 399th section as amended by the Code of 1851. Under section 352 of the Code of 1848, the assignor of a thing in action, assigned for the purpose of making him a witness, was left to be disposed of by the rules of the common law. If interested, he must have been excluded, unless released. But the present Code makes him competent, without a release, though he be interested in the event of the action, and though the assignment was made for the express

purpose of making him a witness. The evils resulting from this departure from common law principles were doubtless intended to be compensated by the ten days notice of the proposed examination. Such notice will prevent surprise, and is in harmony with the practice in other cases. We think this is the true construction of the section, and we accordingly set aside the report, with costs to abide the event, for the error of the referee in admitting the assignor, without such notice.

SUPREME COURT.

STANNARD agt. MATTICE.

Where a summons has been served on only one of two defendants, who are severally as well as jointly liable, the plaintiff may proceed against the defendant served, as if he were a sole defendant; otherwise, if the defendants are liable jointly and not also severally. In the latter case the judgment must, in form, be entered against both defendants.

Where several causes of action are improperly joined, the remedy is by demurrer and not by motion to set aside the complaint.

Where a party is not within the county in which the attorney resides, the attorney may verify a pleading, though the action or defence be not founded on a written instrument in possession of the attorney, and though all the material allegations of the pleading may not be within the personal knowledge of the attorney. But in such case the attorney must set forth in the affidavit of verification his knowledge, or the grounds of his belief on the subject, and the reasons why it is not made by the party.

Albany Special Term, July 1852. The defendant moved to set aside the complaint served in this action on the following grounds:

1. The variance between the complaint and summons in the parties to the action.

2. The complaint contains a claim against Adam Mattice upon a separate liability alone in connexion with a claim for equitable relief.

3. The verification is irregular in being made by the attorney.

The place of trial named in the complaint was the county of Schoharie.

The verification was in the following words:

"*State of New York, Otsego County, ss:* Abraham Baker, of Worcester in the county of Otsego, being duly sworn says, that he has read the foregoing complaint, and that he knows the contents thereof and knows the same to be true, except as to the matters therein stated to be on information and belief, and as to those matters he believes the same to be true. That the reason plaintiff does not make this affidavit is that he resides in Albany county. Deponent has more knowledge of the record evidence and proceedings than the plaintiff; that he, this deponent, has been the plaintiff's attorney in all the proceedings set out in the complaint and knows the existence thereof as therein stated; of the deed in the clerk's office; heard the defendant admit the fact that said deed was executed when he was not present, and when said Henry Mattice was on his way off to leave this state. Deponent knows the fact from information that Henry Mattice was unembarrassed and owed no debts, and was in easy circumstances in January 1850; that the plaintiff is a poor man and that it will be an unnecessary expense to send to him to make oath to his complaint, and further deponent says not.

ABRAHAM BECKER.

Subscribed and sworn before me, July 3, 1852.

EZRA D. MUDGE, *Justice of the Peace.*"

The other facts sufficiently appear in the opinion of the court.

J. H. REYNOLDS, *for Defendant.*

J. K. PORTER, *for Plaintiff.*

PARKER, Justice.—The first point is not tenable. Though the summons was issued against both Henry Mattice and Adam Mattice, it was served only on the latter. It appears from the papers that the defendants named in the summons are severally as well as jointly liable; and in such case the plaintiff is at liberty to proceed against the defendant served, in the same manner as if he were the only defendant (*Code*, § 136, *sub.* 2). It is only where the defendants are jointly and not also severally liable, that judgment is necessarily to be entered against all the defend-

ants (§ 136, *sub.* 1). The plaintiff gave notice with his complaint, at the time of service, of the reason why he proceeded against Adam Mattice alone.

The second ground for this motion is equally untenable. If several causes of action have been improperly united, the remedy is by demurrer (*Code*, § 144, *sub.* 5).

The third objection is, that the verification is irregular in being made by the attorney. Under this point, it is not claimed that the verification may not be made by the attorney, but that the verification being made by the attorney is insufficient. Without enquiring whether a complaint can be set aside for such a reason, and whether the defendant ought not, in such case, to treat the complaint as one not verified, I shall consider the question which the counsel preferred to submit, viz: the insufficiency of the verification.

Section 157 of the Code provides that the verification shall be made by the party, if such party be within the county where the attorney resides, and capable of making the affidavit. In no other case does the statute require the verification to be made by the party. But the same section further provides that the affidavit may also be made by the agent or attorney, if the action or fence be founded upon a written instrument for the payment of money only, and such instrument be in the possession of the agent or attorney; or if all the material allegations of the pleading be within the personal knowledge of the agent or attorney. In either of these two cases last provided for, the affidavit may be made by the agent or attorney, wherever the party may be; that is to say, even though the party may be within the county where the attorney resides. It is contended by the defendant's counsel that unless the action be founded on a written instrument in possession of the attorney, the attorney can in no case verify the complaint, without swearing that all the material allegations are within his personal knowledge. In other words, that an attorney can verify no allegation on his belief, as a party may do. That this is a wrong construction, is evident from the next clause of the same section, which provides that "where the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge, or the grounds of his belief on the

subject, and the reasons why it is not made by the party." It is evident, therefore, that there may be cases in which an attorney may verify allegations on his belief.

Although the best form of expression to indicate the intentions of the legislature is not employed in the section in question, yet, I think, the intention can not well be mistaken, if effect is given, as it ought to be, to all parts of the section. That intention is, that the pleading shall be verified by the party, if within the county where the attorney resides. If not, it may be verified by the attorney. It may also be verified by the attorney whether the party is within the county or not, when it rests on a written instrument in the possession of the attorney, or when the attorney has personal knowledge of all the material allegations of the pleading; and in all cases, the attorney must state in his affidavit of verification, his knowledge or the grounds of his belief, and the reason why it is not made by the party.

Reference has been made to Hunt vs. Meacham (6 *How. Pr. R.* 400), to show that in all cases not founded on a written instrument, the attorney must have personal knowledge of all the material allegations of the pleading. It does not appear by that case where the attorney resided; and though the language of the decision is broad enough to cover the position taken by the defendant's counsel, it must be construed with reference to the facts before the court. I do not think the learned justice regarded that case as presenting the same question involved here.

The motion must be denied, but without costs.

SUPREME COURT.

HEMPSTEAD agt. HEMPSTEAD.

"Subsequent pleading," in section 456 of the Code, means subsequent in the order of pleading. An amended complaint can not be called a subsequent pleading, when spoken of with reference to a previously served answer.

An order of a justice of this court, staying proceedings twenty days, when served with the affidavit on which it was granted, though unaccompanied by a notice of motion, can not be treated as a *nullity*. The proper remedy is by motion to vacate or set aside the order.

Albany Special Term, July 1852, *Motion to set aside judgment.* Place of trial Schoharie county. The complaint duly verified was served on 8th January 1852. February 12th, the answer, also verified, was served by mail. March 23d, complaint (amended in material parts), was served. The amended complaint was not verified, and was returned because it was not verified. The defendant treated the cause as at issue on the first pleadings and noticed the cause for trial. Plaintiff proceeded and entered up judgment for want of an answer to the amended complaint. Judgment was entered on 14th May 1852. On 8th May 1852, defendant's attorneys, on an affidavit, procured from Justice MULLETT an order staying the proceedings for twenty days, and on the 9th May served such order and a copy of the affidavit on which it was granted, by mail; but no notice of motion was served with the order. The plaintiff's attorney disregarded the order in entering judgment.

J. K. PORTER, *for Defendant,* contended, among other things, that the amended complaint was a subsequent pleading, within the meaning of section 156 of the Code, and ought to have been verified, in as much as the answer previously served, was verified.

J. H. REYNOLDS, *for Plaintiff.*

PARKER, Justice.—It was not necessary to verify the amended complaint. "Subsequent pleading" in section 156 of the Code, means subsequent in the order of pleading; not subsequent in time. It applies only to pleadings in answer to the pleading verified, or to those which follow in the order of pleading. The defendant ought, therefore, to have answered the amended plead-

ing; or, at least, to have notified the plaintiff's attorney, that he wished his answer already served to stand for an answer to the amended pleading, if the same was appropriate.

But the plaintiff was wrong in entering up judgment after he had been served with the order of Justice Mullett. That order stayed the proceedings twenty days, and was served with a copy of the affidavit on which it was granted. It was not, as it ought to have been, accompanied by a notice of motion. But I do not think it was therefore void and inoperative. It was irregular and would have been set aside on motion. A careful examination of the cases from which the impression has been derived that such an order is void, will not sustain the proposition (3 *John. Rep.* 451; Roosevelt vs. Fulton, 5 *Cowen*, 438; Chubbuck vs. Morrison, 6 *How. Pr. R.* 367). Roosevelt vs. Fulton was decided on a motion to vacate, and the question did not arise and it was unnecessary to say whether the order might have been disregarded; though in that case the party might safely have done so, for the order had not been served on him; it had been served only on the sheriff.

The parties have both been in fault; and the proceedings subsequent to the service of the amended complaint must all be set aside, without costs to either party, and the defendant must have twenty days after notice of this decision and a return to him of the amended complaint in which to answer it.

SUPREME COURT.

WATSON AND ANOTHER agt. SCRIVEN AND OTHERS.

As the Code now stands (amendment of 1852) two modes of proceeding to obtain a review of a trial, are prescribed. The one is applicable exclusively to trials by jury; the other to trials by the court or by referees. They are entirely distinct from each other.

In the case of a trial by jury, the review must first be had *before* judgment at the circuit or special term, for a new trial; and this decision may be reviewed on appeal at the general term.

In the case of a trial by the court or referees, either upon questions of fact or of law, no review can be had until *after* judgment, and then only upon appeal under § 348 of the Code.

Albany Special Term, May 1852. *Motion to stay proceedings, &c.* The action is upon a promissory note. The defendants are makers and endorsers. The referee to whom it had been referred, made his report in favor of the plaintiffs on the 9th of April. The defendants have made a case, which has been duly settled, and they now move for a stay of the plaintiff's proceedings upon the report, until they can make a motion to set aside the report of the referee.

OTIS ALLEN, *for Plaintiffs.*

S. STEVENS, *for Defendants.*

HARRIS, Justice.—This motion involves the inquiry, how the decision of a referee may be reviewed. On the one hand, it is supposed that a motion to set aside the report may be made before judgment, as under the former practice, while on the other, it is contended that the review can only be had upon appeal from the judgment. In the former case, the review would be had at a special term; in the latter at a general term.

As the Code is now amended, two modes of proceeding to obtain a review of a trial are prescribed. The one is applicable exclusively to a trial by jury. The other to trial by the court, or by referees. These modes of proceeding are entirely distinct, each from the other. In one, the review is had *before* judgment. In the other, it can only be had upon appeal *after* judgment. A brief notice of each mode of proceeding may be useful.

First, in respect to trials by jury. The 265th section of the Code provides that where a special verdict has been found, or the cause has been reserved for argument or further consideration, the application for judgment must be made at a circuit court or special term. The decision upon such application can only be reviewed upon appeal under the 348th section. When there has been a general verdict, the motion for a new trial must also be made at the circuit or a special term. The motion may be made upon the minutes of the judge, if made at the same circuit at which the trial was had, and, afterwards, upon a case or exceptions. The decision upon such a motion may be reversed upon appeal under the *second* subdivision of the 349th section. When the motion for a new trial is founded upon exceptions

taken at the trial, or a verdict has been taken subject to the opinion of the court, the judge who tried the cause may dispense with the hearing at a circuit or special term, and order that it be argued, in the first instance at a general term. In that case no appeal is necessary. The general term is authorized to render judgment.

Besides the appeal, *before judgment*, from the decision at the circuit or special term, granting or refusing a new trial under the *second* subdivision of the 349th section, an appeal, *upon questions of law*, may be taken, *after judgment*, under the 348th section.

Second, in respect to trials by the court and by referees. The 268th section of the Code declares that questions, whether of fact or of law, arising upon a trial by the court, can only be reviewed in the manner prescribed in that section—that is, upon an appeal to the general term under the 348th section. For this purpose, when a review upon questions of law is sought, exceptions are to be taken within the time prescribed and a case prepared and settled. The case and exceptions are to form a part of the judgment roll. The mode of review upon questions of fact, is the same as upon questions of law. The only difference is, that, in the former case, the decision of the general term is final, while in the latter, another appeal may be brought to the Court of Appeals. The 272d section prescribes the same practice in all respects, where a review of the decision of referees is sought.

From this examination it follows that no review of a trial by the court or referees, either upon questions of fact or of law, can be had until after judgment, and then only upon appeal brought, in pursuance of the 348th section of the Code. The defendants' motion, therefore, should be denied. Having made a case and procured its settlement, it will become a part of the judgment roll. When the judgment is perfected, the defendants will be at liberty to appeal, and that appeal will bring up for review, at the general term, all the questions, whether of fact or of law, presented by the case. Neither party should have costs upon this motion.

SUPREME COURT.

FIELD AND STONE agt. MORSE.

The plaintiffs sued the defendant by service of summons issued under the first subdivision of § 129 of the Code; which stated that if the defendant should fail to answer the complaint to be filed, the plaintiffs would take judgment for $333·41 with interest, &c.

The defendant not having any defence to such claim, suffered judgment by default. An execution was issued against his property and returned unsatisfied; when the plaintiffs proceeded to issue execution against his person. On examination of the complaint filed, the defendant found that it contained specific allegations of fraud, in the purchase of the property for which the debt was created.

Held, that the plaintiffs could not do that. They should have issued their summons under the *second* subdivision of § 129.

And further, that if the defendant had taken issue on the question of fraud, and it had been found in his favor, he would have been entitled to judgment. The plaintiffs could not have judgment for their debt, because the *gravamen* of the action was fraud.

Whether if the complaint had not contained any allegations of fraud, an execution might have issued against the person. *Quere?*

Monroe Special Term, 1852. ***Motion to set aside a judgment.*** The action was commenced in November 1851, by the service of a summons, without a copy of the complaint. The summons, in conformity with the first subdivision of the 129th section of the Code, stated that if the defendant should fail to answer the complaint to be filed, the plaintiffs would take judgment for $333·41, with interest from the 8th of October. The defendant admitting his indebtedness to the amount stated in the summons, and being, as he states in his affidavit, insolvent and wholly unable to pay the debt, did not appear, and on the 13th of December 1851, a judgment was perfected for the amount of the debt with costs. Execution having been issued upon the judgment, and returned by the sheriff unsatisfied, the plaintiffs' attorneys wrote to the defendant on the 18th of February, stating that they had "*now the right to issue an execution against the body*," and suggesting the expediency of making some arrangement to prevent it. The defendant, upon receiving this letter, immediately caused

an examination to be made, with the aid of counsel, and then learned from the complaint on file that he was charged with having fraudulently contracted the debt, and the alleged frauds were specifically set forth in the complaint, with the design, as he believed, in case judgment should be recovered by default, of subjecting the defendant to imprisonment upon execution. The defendant states that had he been apprised of the nature of the action, he should have defended it; and that he could have done so successfully. Upon an affidavit showing these facts the defendant moved to set aside the judgment, and to be let in to defend the suit. In opposition to the motion affidavits were read tending to establish the allegations of fraud set forth in the complaint.

M. S. NEWTON, *for Plaintiffs.*

F. L. DURAND, *for Defendant.*

HARRIS, Justice.—It has been well said that under our present system of practice, every action is an action on the case (*Per* GRIDLEY, J. in Minor vs. Terry, 6 *How. Pr. R.* 208). In such an action, the plaintiff was required to set forth particularly the facts upon which he relied as the ground of his action. So now, in every case, the plaintiff is required to set forth the particular facts which go to constitute his cause of action. By the facts, thus alleged, he must stand or fall. If, in the judgment of the court, they do indeed constitute a valid cause of action, and are established by proof or otherwise, the plaintiff recovers the judgment appropriate to the facts. The judgment is *secundum allegata et probata.*

The Code also requires the plaintiff in the process by which he commences his action, to apprise the defendant, when it is founded on contract, and a recovery of money only is sought, for what amount he claims to recover judgment, and, in other cases, that if the defendant fails to answer, he will apply to the court for such relief as may be specified in his complaint. In pursuance of this requirement, the plaintiffs in this action informed the defendant that their action was upon contract, and they stated the amount which they claimed to recover. Against such an action the defendant had no defence to make. He admits that he was

justly indebted to the plaintiffs, upon contract, to the amount stated in their summons. But when he has occasion to examine the complaint to which the summons refers he finds there set forth a very different cause of action; one which, instead of merely alleging his indebtedness to the plaintiffs, affects his reputation and his liberty. The gravamen of the complaint is, that by various false representations and fraudulent devices particularly set forth, the defendant had induced the plaintiffs to part with their goods, and thus he had become indebted to them to the amount stated. The action, as stated in the complaint was founded upon a wrong, and not a contract. The summons, therefore, should have been under the *second* and not the first subdivision of the 129th section (Flynn agt. the Hudson River Rail Road Company, 6 *How. Pr. R.* 308; Masten vs. Scovel, *id.* 315). In this respect, therefore, the plaintiffs' practice was irregular.

Had the defendant been apprised of the nature of the allegations in the complaint, it is not to be supposed he would have suffered judgment to pass against him by default. And if he had appeared and answered the allegation of fraud, an issue of fact would have been formed, which, if found in his favor, would have entitled him to judgment. For I can not agree with the plaintiffs' counsel that, upon such a complaint, the plaintiffs would have been entitled to judgment for their debt, even though the issue upon the allegations of fraud should be found against them. What could be more unreasonable than that the plaintiffs should be permitted to enter upon such a litigation with the assurance that, though *defeated*, they must *triumph;* that though the issue be found against them, they would recover judgment for their debt, with the costs of their unsuccessful litigation. The court would not find itself shut up to any such injustice. The plaintiffs having selected the form of their allegations against the defendant, must sustain them or fail in their action.

That the defendant is liable to imprisonment upon the judgment as it now stands, there can be no doubt. Whether if the complaint had merely set forth the indebtedness of the defendant upon the sale of the goods, without any allegations of fraud, an-

execution against the body might have been issued upon the judgment, is a question not yet settled. The effect of the 179th section of the Code was very elaborately discussed by Mr. Justice SHANKLAND, in Corwin vs. Freeland (6 *How. Pr. R.* 341). The point in judgment in that case was, whether an order of arrest obtained before judgment, and upon which the defendant had been arrested and had given bail, was of itself, an authority for issuing an execution against the body, there being nothing in the judgment itself which would justify such an execution. It was held that a defendant who had been arrested upon an execution under such circumstances, might maintain an action for false imprisonment. To this extent that case must be regarded as authority. Nor can there be a doubt of the correctness of the decision.

The learned judge who delivered the opinion in that case, besides examining the question immediately before the court, has done what I am now permitting myself to do, and examined some questions not necessary to the decision in hand, though kindred thereto. In most of the views he has expressed I entirely concur. To all the six propositions with which he winds up his extended and very able discussion I assent, excepting only the *first*.

I am unable to see upon what argument or provision in the Code, he founds his conclusion that "where the cause of arrest exists at the time of drawing the complaint, that cause should be stated therein." As I understand the Code, nothing can properly be inserted in the complaint, even though it may constitute a cause of arrest if it do not also constitute the cause of action, or a part of it. The complaint is to contain the facts constituting a cause of *action*, not a cause of *arrest*. If the facts alleged as a cause of action also show that the defendant is liable to arrest, it is very well; but when, as it may sometimes happen, the facts which constitute the cause of action are entirely distinct and different from those which show that the defendant is liable to arrest, the latter facts ought not to be inserted as allegations in the complaint, and if they are they should be removed upon motion, as not properly belonging to that pleading. The liability of the defendant to arrest, in case judgment shall be recovered

against him, is not an issuable fact which can be properly alleged in pleading.

In most, perhaps all cases, except when the recovery is upon a contract, the record itself will show whether the defendant is liable to imprisonment. The cause of action, as set forth in the complaint, and the cause of arrest are the same. The same facts which establish the plaintiffs' cause of action will also establish the liability of the defendant to be imprisoned upon execution. But when the action is founded upon contract, it may or may not be so. In such cases, I understand the rule of law to be substantially as stated in Mr. Justice Shankland's *third proposition*. If the liability to arrest is shown by the facts upon which the recovery is had, that, of course, is enough. But when such liability does not appear, as may well happen in the cases for which the 5th subdivision of the 179th section of the Code provides, then the plaintiff may at his peril issue execution against the body, though his right to such execution does not appear upon the record, and, if prosecuted for such arrest, or, if a motion is made to set aside the execution, he must establish the facts which authorized the arrest. The radical error, indeed, I may say, the only error, as it seems to me, into which the very able judge whose opinion I have been noticing has fallen, is in assuming that the plaintiff may, whether it constitute a part of his cause of action or not, allege in his complaint, and thus tender an issue upon the facts which he claims will render the defendant liable to imprisonment. Upon this question, as I have before had occasion to say (Masten vs. Scovel, 6 *Howard*, 315), I concur entirely in the views expressed by Mr. Justice WELLES in Cheney vs. Garbutt (5 *Howard*, 467).

The judgment in this action must be set aside, and the defendant may have the usual time to answer, after being served with a copy of the complaint. The plaintiffs are also to be at liberty to amend their summons, if they shall see fit. Neither party is to have costs upon the motion.

SUPREME COURT.

WARD AND WARD agt. DEWEY.

To entitle plaintiff to a temporary injunction, under § 219 of the Code, he must make a case, showing that the act complained of will *not only produce an injury to him, but that he is entitled to final relief by a perpetual injunction.* (*This agrees with Woodworth agt. Lyon*, 5 *How. Pr. R.* 463: *Corning agt. Nail Factory*, 6 *id.* 89; *and is adverse to Cure agt. Crawford*, 5 *How. Pr. R.*. 293. *See also Perkins agt. Warren*, 6 *How. Pr. R.* 341: *Malcolm agt. Miller*, *id.* 456.)

A mortgage, judgment of foreclosure, and a sale under the judgment, with a deed to the purchaser, all combined, can not affect the title of one who was not a party to the mortgage nor to the foreclosure suit.

Where one tenant in common executes a mortgage upon the whole farm held in common, without any description restricting its effect to the share of the mortgagor, the mortgage, judgment of foreclosure thereon, the sale and the deed thereon to the purchaser can not divest the title of his co-tenant. The purchaser under the foreclosure sale only obtains the same right, title and interest which the mortgagor had in the mortgaged premises, at the time of executing the mortgage

It is the settled law of the courts of equity to deny relief to a party seeking the aid of the court to remove a *supposed cloud* upon his title, whenever it is apparent, upon the face of the proceedings from which the cloud or adverse claim is derived, that the law adjudges such claim to be ineffectual.

Where a temporary injunction is granted to restrain a sale under a judgment of foreclosure, on the ground that the sale of the share or interest of the plaintiff who was neither a party to the mortgage, nor to the foreclosure suit, will be injurious to the plaintiff's title, the injunction will be dissolved, because the mortgage, judgment and sale can neither affect nor create a cloud upon the plaintiff's title.

At Chambers, Cooperstown, July 28, 1852. *Motion founded upon the complaint alone to dissolve a temporary injunction.* The injunction was granted by Justice WATSON, on the 8th of the same month to restrain the defendant from selling a farm upon an advertisement of sale under a judgment in an action brought for the foreclosure of a mortgage which was executed by the mother and brother of the plaintiffs, in the spring of 1850, to secure the payment of $2600, and the interest. Neither of the plaintiffs executed the mortgage, nor were they made parties to the foreclosure suit. It was alleged in the complaint that the

plaintiffs, as devisees of their father, who died in 1837, were the owners in fee of an undivided half of the farm, but the mortgage *purported to cover the whole* farm, and therefore the mortgage and judgment was a *cloud* upon their title.

JAMES E. DEWEY, *for the Motion.*

LYMAN TREMAIN, *Opposed.*

CRIPPEN, Justice.—The injunction was granted upon the complaint in this action, duly verified by the oath of Cornelius S. Ward, one of the plaintiffs. The plaintiffs allege in their complaint that Samuel Ward died on the 11th day of March 1837, seized in fee of a farm of land containing about one hundred and eighty and a half acres, leaving Eleanor Ward, his widow, and the plaintiffs, together with Chapman S. Ward and Polly Ward, his only children and heirs at law; that said Samuel Ward duly devised all of his real estate to his four children equally.

In the spring of 1850 the said Eleanor Ward and Chapman S. Ward executed and delivered to the defendant a mortgage covering the whole of said farm, to secure the payment of $2600 and interest; that the plaintiffs were both minors at the time of the giving of the mortgage as aforesaid. The complaint also alleges that the defendant has caused notice of the sale of said farm to be published in a newspaper in the county of Schoharie, and has posted up such notice at several public places in the town of Jefferson in said county, setting forth that said farm would be sold by virtue of a judgment of foreclosure, recovered on said mortgage against Eleanor Ward and Chapman S. Ward at a time and place specified in said notice and describing said farm therein as being in possession of said Eleanor Ward and Chapman S. Ward. The plaintiffs also allege that the defendant threatens to sell the whole of said farm according to said notice as they are informed and believe; that said mortgage and judgment are a cloud upon the title of the plaintiffs to their undivided half of said farm, and in case the defendant is permitted to sell the farm pursuant to said judgment and notice, such sale and the deed executed thereon will be injurious to the plaintiffs' title. The plaintiffs also allege that they have requested the defendant not to sell the half of said farm devised to them by the

said Samuel Ward, deceased, but that said defendant insists upon selling in conformity to his said notice of sale, and refuses to comply with the requests of the plaintiffs in that behalf.

The complaint prays for a temporary injunction restraining the sale of said farm pursuant to said judgment and notice of sale, and for a judgment in said action perpetually restraining the sale of that portion of said farm devised to the said plaintiffs, and also that the mortgage and judgment of foreclosure may be set aside so far as relates to the half of said farm belonging to the plaintiffs.

The plaintiffs obtained a temporary injunction upon said complaint on the 8th day of July 1852, and the defendant now moves to vacate said injunction upon the ground that the mortgage executed by Eleanor and Chapman S. Ward, and the judgment of foreclosure recovered thereon, *do not create a cloud* at law or in equity upon the plaintiff's title to the one-half of said farm.

Although the mortgage describes the whole farm, and purports to be a lien thereon; yet in as much as it is only executed by Eleanor and Chapman S. Ward, and not by the plaintiffs, or either of them, their undivided half of said farm is entirely unaffected by said mortgage and the judgment of foreclosure recovered thereon.

In order to entitle the plaintiffs to a temporary injunction they must make a case, showing that the act complained of will not only produce an injury to said plaintiffs but that they are entitled to *final relief by a perpetual injunction*, as prayed for in the complaint (6 *How. Pr. R.* 89, 92–3; *id.* 341).

It should be recollected that the mortgage described in the complaint is only executed by Eleanor and Chapman S. Ward; that the plaintiffs in this action are neither parties to said mortgage, or to the judgment of foreclosure recovered thereon. It follows, therefore, that the mortgage and judgment are a nullity and can have no force or effect *as against* the plaintiffs in this action. The mortgage, the judgment thereon and a sale under said judgment with a deed to the purchaser, all combined, can not affect the plaintiffs' title in the least, because they were not parties to the mortgage or to the foreclosure suit thereon (*Strong vs. Dollner*, 2 *Sandf.* 444; *Watson vs. Spence*, 20 *Wend.* 260;

Denton vs. Nanny et al., 8 *Barb. S. C. Rep.* 618). A deed upon the sale under the judgment of foreclosure will have the same effect as a deed from the mortgagors conveying their equity of redemption to the purchasers, and no greater, and is only a lien against such persons as were parties to the foreclosure suit.

The purchaser is invested with the title of the mortgagors and nothing more; if they had a fee in one half of the farm at the time of giving the mortgage, the purchaser under the foreclosure sale obtains that title. If the plaintiffs in this action were tenants in common with the mortgagors owning a moiety or other share, or interest in said farm, such interest or share will remain unaffected by a sale under the mortgage or judgment of foreclosure as alleged in the complaint. It appears to be the settled law in courts of equity to deny relief to a party seeking the aid of the court to remove a supposed cloud upon his title, when upon the face of the proceedings from which the cloud or adverse claim is derived, it is clear that the law adjudges such claim to be void and ineffectual. I can not resist the conclusion that the complaint in this action very clearly shows that a purchaser under the foreclosure sale, through which he can alone claim his title to said farm, only obtains a title to so much of said farm as belonged to the mortgagors at the time of executing the mortgage to the defendant. The complaint on its face alleges that the plaintiffs are the devisees and owners of one half of the farm under the will of their father. The mortgage executed by the widow and another devisee of the testator, describing the whole farm, can not divest the plaintiffs of their share or right in said farm. This being the obvious and undoubted legal result, as is manifest from the facts alleged in the complaint, I have no doubt that the preliminary injunction should be dissolved (2 *Comst. R.* 118; 3 *Barb. R.* 487, *and cases there referred to*).

The motion to dissolve the preliminary injunction is therefore granted, with $10 costs of motion.

SUPREME COURT.

Burhans agt. Tibbits.

The verdict of a jury may be amended or corrected so as to conform to the facts, where there is no doubt as to such facts, either by certificate of the judge or otherwise, and of the real intentions of the jury.

Where, however, the slightest doubt exists as to what transpired on the trial, or if any exist that the whole case has been disposed of by the court and jury, an amendment should not be allowed.

Where two issues were tried, one having been disposed of by the decision of the judge and the other submitted to and passed upon by the jury: *Held*, that it being proper and the evident intention of the jury under the direction of the judge, to find upon both issues, in order to make a complete record, it was proper for the judge to allow an amendment of that kind.

Albany Special Term, August 1851. *Motion to set aside the entry of an amended verdict made at the Circuit.* The action was for trespass upon lands, and also for taking and converting personal property found upon those lands. The defendant justified the entry by alleging title. Upon the trial, the judge, when the evidence was closed, decided, as matter of law, that the justification was sustained, and instructed the jury that, in respect to the trespass the action was not sustained, and that the only question for them was in respect to the conversion of the personal property, consisting of *a few dry poles* lying upon the premises in controversy. The jury rendered a verdict for *fifty cents* in favor of the plaintiff; and thereupon, at the request of the defendant's counsel, the judge allowed them to state upon what issue they found their verdict. They stated that it was for *the dry poles*, and an entry to that effect was made by the clerk in his minutes. Subsequently, upon the application of the defendant's counsel, the plaintiff's counsel being present and objecting, the judge directed the verdict to be amended so as to read as follows: "The jury find for the defendant upon the question of title put in issue by the pleadings, and a verdict of fifty cents in favor of the plaintiff for the value of certain personal property of the plaintiff found upon the premises by the defendant and by him

converted to his own use." This amended verdict the plaintiff moved to vacate.

J. K. PORTER, *for Plaintiff.*

H. G. WHEATON, *for Defendant.*

HARRIS Justice.—Two questions were tried. The one which was the principal question, whether the defendant had unlawfully entered upon the plaintiff's land; and the other, whether he had unlawfully taken and converted to his own use a small amount of personal property found upon the premises. The former issue the judge decided in favor of the defendant, and so instructed the jury. The latter alone was submitted to the jury. A general verdict was rendered in favor of the plaintiff. If this had been intended to apply to both issues, it would have been the duty of the court to set it aside, for the first issue had been withdrawn from the consideration of the jury. The court therefore allowed the jury to state upon which of the issues they found their verdict, and they, very properly, responded that it was upon the issue submitted to them—that it was for the dry poles. But such a verdict left the finding of the jury incomplete. There would be nothing upon the record showing that the issue upon the question of title had been disposed of. The fact that the court had, in effect, directed a verdict for the defendant upon that issue, did not appear. On this account, the amendment was necessary. The entry which the judge directed the clerk to make, gave shape and effect to the real finding of the jury. The question is whether the judge had authority to direct it? In strictness, the jury should have found for the defendant upon the question of title. But their intention so to find is manifest. Can the court give effect to such manifest intention? It has always been held that when a verdict is sufficient, in substance, to conclude the parties upon the issues tried, the court in which the trial is had, may give it appropriate words, and, even after error brought, an appellate court may make it right by amending the transcript and ordering the record below to be corrected (Rockefeller vs. Donnelly, 8 *Cow.* 623). "When the intention of the jury is manifest," said Lord Mansfield, in Hawkes vs. Crofton (2 *Burr.* 698), "the court will set right matters of form." And it is laid down

in *Hobart*, 54, "that if the point in issue can be concluded out of the finding, the court will work the verdict into form and make it serve." Thus, in Petrie vs. Hannay (3 *Term R.* 659), the defendant had pleaded the general issue and the statute of limitations. There was a verdict for the plaintiff upon the first plea, but nothing said about the other. Error was brought upon this very ground. But the court ordered the verdict to be amended so as to make it applicable to both issues. It is well settled, too, that where there are several counts in a declaration, and the jury find a general verdict, the court will, if some of the counts are bad, allow the verdict to be amended, upon the judge's certificate that the evidence given upon the trial was all applicable to the good counts (Sayre vs. Jewett, 12 *Wend.* 135; Norris vs. Dunham, 9 *Cow.* 151; Cooper vs. Bissell, 15 *John.* 318). In the executors of Van Rensselaer vs. The Executors of Platner, 2 *John. Cases*, 17, the plaintiffs, as executors, had sued for and recovered in the same action, rent upon an estate in fee, which had accrued both *before* and *after* the death of their testator. It was held that the objection, on the face of the record, was fatal to the recovery. But Radcliff, J. said, "If it can appear from the judge's notes on the trial, that the plaintiffs claimed and recovered for the previous rent only according to the modern and more liberal practice of our courts, I am inclined to allow the verdict to be altered or amended, agreeable to the truth of the case." In Beekman vs. Bemus, 7 *Cowen* 29, the jury in an action of replevin had found a general verdict for the plaintiff. The circuit judge, after the jury had separated, ordered the verdict to be amended by adding "six cents costs," and the court, in term, when a new trial was asked for, allowed the verdict to be further amended by adding "six cents damages."

Jones vs. Kennedy (11 *Pick.* 125), is quite in point. There the declaration contained three counts; one upon a note, another for goods sold, and a third upon an account stated. The defendant pleaded the general issue. The jury returned a verdict for the plaintiffs on the first count. It was objected that the verdict did not find the whole of the issue. The court said the verdict might be amended so as to make it a verdict for the defendant upon the other counts. "There being no evidence to establish

the third count, the attention of the jury was properly directed to the consideration of the first and second counts. And as the case was presented to them, their finding the promise alleged in the first, *implied* a negation of the promise set forth in the second. Under these circumstances, we see no objection to entering a verdict for the defendant upon the second and third counts." The same may be said of the case in hand. As the case was presented to the jury, their finding a verdict for the plaintiff generally implied that they found the conversion of the poles. When required to state the ground of their verdict, they so declared. This finding necessarily negated any finding for the plaintiff upon the other issue. They followed the direction of the court which was, in substance, that upon the first issue the defendant was entitled to their verdict. See also Porter vs. Rumming (10 *Mass.* 64), where it was held that the court might amend a verdict by putting it into form, if the intention of the jury could be gathered from their finding. Also Clark vs. Lamb (6 *Pick.* 512). In the latter case the verdict did not, in terms, find the whole issue. The court said, "if the judge shall certify, as we understand he is able to do, that there was but one demand in fact submitted to the jury, we think the verdict may be corrected." Where in ejectment, a verdict had been rendered for one half the premises, nothing being said about the other half, the verdict was amended by adding the words, "and for the residue they find for the defendant" (Scott vs. Galbraith, 1 *Dallas*, 134).

But I need not cite other authorities to show how uniform has been the practice of amending verdicts, so as to make them conformable to the facts as certified by the judge. I admit that extreme caution should be used in allowing such amendments. Where the slightest doubt exists as to the real intention of the jury, their verdict ought not to be changed. But where no such doubt exists, it would be an unnecessary obstruction to the administration of justice to refuse such an amendment. When mistakes occur, and occur they will and do, every court will feel bound, so far as practicable without injustice to any one, to correct them. If, in this case, there had been any doubt as to what transpired on the trial; or, if there had been any doubt that the whole case had been disposed of by the court and jury in the manner in-

dicated by the amended verdict, the amendment ought not to have been allowed, or, being allowed, it should be set aside. But there is no such doubt. No one denies that the case was fully heard and entirely disposed of. The jury intended to follow the direction of the court in relation to the question of title. The only error was in omitting formally to take their verdict for the defendant upon that issue. The case is clearly within the principle by which courts, from the earliest periods of our jurisprudence have been governed in allowing such amendments. The motion is therefore denied, but without costs

SUPREME COURT.

Elliott agt. Hart and Spear.

Misnomer of defendants may be taken advantage of by motion to set aside the summons and complaint. It is doubtful whether under the Code there is a remedy in such case by answer.

Livingston Circuit and Special Term, February 1852. The copy summons and complaint served on the defendant Hart states the names of the defendants as *Isaiah* N. Hart and *Samuel* Spear. The copy summons served on the defendant Spear, states their names as *Israel* N. Hart and *Samuel* Spear; but in the copy complaint served on him they are named *Isaiah* N. Hart and *Samuel* Spear. The true names of the defendants are *Isaac* N. Hart and *Simon* Spear. The defendants, by separate attorneys, move to set aside, each as to himself only, the summons and complaint with costs.

J. K. Hale, *for Plaintiff.*
H. Chalker, *for Defendant Hart*, and
Geo. Bishop, *for Defendant Spear.*

T. R. Strong, Justice.—Prior to 1825 it was the practice to set aside process and subsequent proceedings for misnomer of de-

fendants, if they applied before appearance and before the time for pleading had expired (*see* 4 *Cow.* 148, *and cases there cited*). But in that year a general rule was adopted, by which it was declared the court would not entertain such motions in future, but would leave parties to the remedy of a plea in abatement (*see* 4 *Cow. R.* 157; *Gra. Pr. 2d ed.* 200). No similar provision is contained in the present rules of the court, and it is doubtful whether, under the Code, the former remedy in such case of a plea in abatement exists.* There should be some remedy, and I am inclined to think the practice which existed before the rule of 1825, of moving the court to set aside the proceedings, is now in force under rule 92 of the rules of 1847.

In respect to the copy summons and complaint served on the defendant Spear, there is a variance between the summons and complaint, in stating the names of the defendants, which might perhaps warrant the motion of that defendant, if the rule of 1825 continued in force (*see* 4 *Cow. R.* 549, *and cases cited*; *Gra. Pr. 2d ed.* 201, *and cases referred to*).

The motions are granted with $5 costs to each defendant unless the plaintiff, within twenty days after service of a copy of the order, amend by inserting the true names of the defendants, serve a copy of the amended summons and complaint upon the attorney of each defendant, and pay said costs. Liberty to amend upon such terms is hereby given.

* *See Gardiner agt. Clark*, 6 *How. Pr. R.* 449.

SUPREME COURT.

THE PEOPLE ex rel. BABCOCK agt. COMMISSIONERS OF PLAINFIELD.

Where commissioners of highways refused to lay out a road, and an appeal was brought from that determination to the county judge, whereupon, the referees appointed by the judge, *reversed* the determination of the commissioners, and *ordered* the road to be laid out, but did not lay it out: *Held, that it was the duty of the referees and not of the commissioners to lay out the road*, that the Revised Statutes (1 *R. S.* 519, § 91), required this to be done upon the appeal, *by the judges*, and that the act of 1847, *p.* 584, § 8, makes it the duty of the referees to perform *the same acts*, and therefore a mandamus requiring the commissioners to lay out and open the road, can not be granted.

Such commissioners have no jurisdiction to *lay out* a road after their refusal to do so has been reversed, although the order of reversal directs it to be done; nor have they jurisdiction to open and make the road after such reversal.

The "final determination" mentioned in the act of 1845, *p.* 186, § 13, can be none other than a determination *laying out a road*, as provided by the Revised Statutes, which determination is the only one that the commissioners can be required to carry out under the act of 1845.

A *mere reversal* of the order of the commissioners, is not an order to be carried out by the laying out of the road. The termini, the courses and distance, and the width of the road, must be determined by the referees, otherwise the commissioners have nothing to guide them in performing the duty of opening it.

Commissioners of highways are officers of limited and special jurisdiction. They can only act in *the cases and in the manner* pointed out by statute; and he who asks that their orders shall be executed, *must show* that the statutory requirements have been strictly pursued. *Therefore, held*, that any act done by them in the performance of their supposed duties, will not prevent them from taking the objection that the relator has *failed to show* that the statute under which they acted, had been strictly complied with.

Oneida Special Term, July 1852. Motion for a peremptory mandamus to compel the commisioners of highways *to lay out* and open a highway after the decision of the referees upon appeal *reversing* the decision of the commissioners refusing to lay out the same.

C. H. DOOLITTLE, *for the Motion.*

GEO. W. GRAY, *Opposed.*

W. F. ALLEN, Justice.—The relator moves for a peremptory

mandamus to compel the defendants to lay out and open a highway in the town of Plainfield, Otsego county, upon appeal from a decision of the commissioners refusing to lay out the highway. The matter was referred in pursuance of the statute and the referees *reversed* the decision of the commissioners and *ordered* the highway laid out, *but did not lay it out*, and the objection was taken that it was the duty of the referees to lay out the road, and that the defendants can not be compelled to carry out their decision until the road is laid out by them. This objection is fatal, for reasons assigned by me in The People agt. Commissioners of Highways of Watertown, decided October 6, 1851.

Motion denied. The following is the opinion in that case.

THE PEOPLE ex rel. &c. agt. COMMISSIONERS OF WATERTOWN.

Jefferson Special Term, September 1851.

J. MULLEN, *for the Motion.*

J. MOORE, JR. and J. CLARK, *Opposed.*

W. F. ALLEN, Justice.—An application was made to the commissioners of highways of the town of Watertown to alter the route of a highway in that town, and the requisite certificate of twelve freeholders, to the necessity and propriety of the alteration was procured. The commissioners refused to alter the road in pursuance of the application and from such refusal an appeal was brought by the applicant to the county judge, who being an inhabitant of the town within which was the road in question, the appeal was referred under the statute by one of the justices of the sessions to three referees, who, upon hearing the appeal, ordered that the proceedings of the commissioners be *reversed*, but did not proceed to *lay out the road, or give any directions* in relation to such laying out or altering of the road. The commissioners subsequently proceeded and laid out and altered the road as required by the original application, but now refuse to cause the same to be opened and worked as a highway, and the relator asks that a mandamus issue compelling them to do so.

It is insisted on behalf of the relator, 1st. That this proceeding was under the provisions of the act of 1845, and that by that law the judges or referees are not required upon the reversal of the order of the commissioners, refusing to lay out or alter a highway, to proceed to lay out or alter the same, but that they may simply reverse the order of the commissioners, and that thereupon it becomes necessary that the highway should be laid out or altered, and the duty is by such order of reversal devolved upon the commissioners of highways to lay out or alter the same (*Laws of* 1845, *p.* 186, § 13).

The act of 1845 does not profess to repeal the provisions of the Revised Statutes, regulating the laying out and altering of highways, &c. or to provide an entire system of procedure in such cases. It merely modifies the former provisions of law upon the subject and except as modified leaves them in full force. The former and present statutes regulating and prescribing the duties of commissioners of highways and the proceedings upon appeal from their decisions are substantially the same (2 *R. L.* 275, § 16; *id.* 282, § 36, 37; 1 *R. S.* 514, § 57, 61; *id.* 518, § 84, 89, 91; *Laws of* 1845, 185–6; *Laws of* 1847, *p.* 584–5; Commissioners of Highways of Warwick vs. Judges of Orange co., 13 *W. R.* 432). The Revised Laws did not expressly authorize or require the judges of the Court of Common Pleas, upon an appeal from an order of the commissioners of highways refusing to alter or lay out a highway, to alter or lay out such highway, but it was held that such power was conferred by implication upon a construction of the 36th and 37th sections, and from the want of any provision in the act requiring the commissioners to lay out or alter the road after the judges had decided (People vs. Champion, 16 *John. R.* 61; People vs. Commissioners of Salem, 1 *Cow. R.* 23). The Revised Statutes expressly require this to be done upon the appeal by the judges and the act of 1847 makes it the duty of the referees acting in the place of the judges to perform the same acts (1 *R. S.* 519, § 91; *Laws of* 1847, 584, § 8, 9). The act of 1845 did not, I think, change the proceedings in this respect. Section 13 of the act does not prescribe the duty of the appellate tribunal, but assumes that, by other provisions of law, that has been settled. It does not define the char-

acter of the final determination which shall make it necessary that a highway shall be laid out or altered; such final determination could be none other than that laying out or altering a road as provided by the Revised Statutes, and such determination was that which by a subsequent clause of the same section, the commissioners were required to carry out. The referees could only decide the appeal upon the merits, and doubtless erred in not proceeding to lay out the road (13 *W. R.* 432). It is very evident that a *mere reversal* of the order of the commissioners is not an order to be carried out and executed by the laying out of a highway. Neither the termini, the course and distance, or the width of the road are determined, and the commissioners have nothing by which they can be guided in performing the merely ministerial duty of opening a road already laid out by the appellate tribunal.

2d. It is deemed that the order of the commissioners, laying out the highway, is conclusive, and entitles the appellants to have the road opened and worked. There is no provision in the acts of the legislature regulating the laying out of highways, authorizing the commissioners to lay out a road upon the reversal upon appeal of their order refusing to lay out such road or to perform any act in the premises, except to carry out the order which the judges or referees shall make (16 *J. R.* 61). They are officers of limited and special jurisdiction, and can only act in the cases and in the manner pointed out by statute; and he who asks that their orders shall be executed must show jurisdiction in them, and that the statutory requirements have been strictly pursued (Harrington vs. People, 6 *Barb. R.* 607, *and cases cited by Paige, J.*). This the relator has failed to do in the case. Motion denied.

SUPREME COURT.

PUTNAM agt. VAN BUREN AND OTHERS, infants, by FISH, Guardian.

In an action under the Code to recover the possession of land, corresponding to the former action of ejectment, the death of a sole defendant abates the action, and it can not be continued, under § 121 of the Code, against his heirs at law, as his successors in interest.

If the heirs in such case be infants, and out of possession, and do not themselves ask to be substituted, *it seems* they could not be substituted on the motion of the plaintiff, until they shall have had an opportunity to elect whether they will continue the action by being made parties, or abandon it.

The death of the party revokes the appointment of his attorney. The attorney of the ancestor does not become the attorney of the heirs, without a new appointment.

Warren General Term, May 1852—*Before* WILLARD, *P. J.* HAND, CADY and ALLEN, *Justices.* The plaintiff claiming title to certain real estate in Glenn in the county of Montgomery, under a deed from one Peter Putnam, dated about the 1st January 1839, some time in the year 1850, brought an action under the Code, against Peter P. Van Buren, to recover the possession of said land. The defendant, Peter P. Van Buren, in his answer controverted the plaintiff's title, and set up a title in himself, under the last will and testament of the said Peter Putnam, who is deceased. The issues between the parties were tried at a Circuit Court in Montgomery county in September 1850, when the jury disagreed and were discharged. The cause was again noticed for trial at the June circuit, 1851, but the defendant, Peter P. Van Buren, died before the circuit, leaving Martin Van Buren and others, his infant children and heirs at law. An application was thereupon made on the part of the plaintiff, at the Sept. special term in Herkimer, in 1851, for an order continuing the action against the heirs at law of the original defendant as his successors in interest, and for the appointment of a special guardian for the infants, in case they should fail within a limited time to appoint one. Mr. Justice GRIDLEY, who held that term, granted both orders, from the former of which the defendants have appealed to this court.

F. FISH, *for the Appellant.*

J. A. SPENCER, *Contra.*

WILLARD, Justice.—It was not shown by the petition on which the order in this case was made, that the heirs of Peter Van Buren, the original defendant, were in possession of the premises sought to be recovered, or that they exercised acts of ownership on the premises claimed, or that they claimed title thereto, or any interest therein (2 *R. S.* 304, § 4). From their ages, the oldest being but eleven and the youngest but one year old, they can not be presumed to have done any act personally, to render them amenable to an action. The ground on which the order was made, substituting them as defendants in the place of their deceased father, was, that by the death of their father intestate, the law cast the defence of this action upon them, as his successors in interest. This doctrine is supposed to be found in the 121st section of the Code of procedure.

At common law a cause of action originating in a tort died with the person. The maxim was "*Actio personalis moritur cum persona*" (*Noy's Maxims*, 14; *Broom's Legal Maxims*, 428; 1 *Saund.* 216 *a. n*). This rule in the old authorities is not applied to causes of action on contracts, but to those in tort which are founded on malfeasance or misfeasance to the person or property of another. It follows, that in an action *ex delicto* by a plaintiff against a sole defendant, the death of either party before judgment abates the action (1 *Saund.* 72, *k*). At common law, therefore, the present action abated by the death of the original defendant, Peter P. Van Buren. It was not aided by the Revised Statutes (2 *R. S.* 387, § 3, 4), because the death happened before any interlocutory judgment or verdict was had in the case. Unless it is aided by the 121st section of the Code, it can not be continued against the heirs at law of the deceased original defendant.

That section (121) provides that no action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the *cause of action survive or continue.* In case of death, marriage or other disability of a party, the court, on motion, at any time within one year thereafter, or after-

wards on a supplemental complaint, may allow the action to be continued by or against his representative or *survivor in interest*, &c. As there was in this case but one party plaintiff and defendant, there is no survivorship, since that term implies that the cause of action became vested in, or against the survivor. Unless, therefore, the *cause of action continues in favor of the plaintiff, and against the heirs at law of the defendant in the action, on his death*, the action abates as at common law. There is a distinction between a *right*, and a *cause of action*. An estate may be turned to a *right*, as by discontinuance, disseisin, &c. when it shall be said *quod jus descendit et non terra*. A man may have a lawful *right* or cause of entering into lands whereof another is seized, for the which he can have no action (*Co. Lyt.* 345 *b*). The 121st section of the Code has reference expressly to the *continuance* of the *cause of action*, and not merely of the right to the property. The *cause of action* for the recovery of land involves two ideas: *First*, the valid subsisting interest of the plaintiff in the premises claimed, and right to recover the same, or the possession thereof, or of some share, interest or portion thereof (2 *R. S.* 303); and, *second*, the actual occupancy thereof by the defendant; or, if not so occupied, the exercise by the defendant of acts of ownership on the premises claimed, or the claiming title thereto, or some interest therein, at the commencement of the suit (2 *R. S.* 394, § 4). The first branch of this description of a cause of action *continues* notwithstanding the defendant's death, pending the action, and before verdict or judgment; but the second does not continue. If we suppose that at the time of the commencement of the action, the original defendant was in the actual possession, and that thus the plaintiff, being the owner of the premises, had a cause of action against him, it is a contradiction in terms to say, now that the defendant is dead, that his infant children were in truth the actual occupants when the action was commenced. By the death of the original defendant a *new cause of action* is given to the plaintiff, providing a new occupant succeeds to the possession. If the premises are left vacant, without an occupant or a claimant, the plaintiff may enter without suit. In such case there is clearly nobody against whom he could bring a fresh

action, and no reason is perceived why the original action should be continued. The right of entry in such case is better than a cause of action.

There is no reason in the nature of things why, in an action to recover land, the heirs at law of the defendant on his death before judgment or verdict, should be substituted. The plaintiff's right to the possession is not impaired, or affected by a descent being cast in consequence of such death (*Code*, § 87). He may bring an action against them in case they unlawfully withheld from him the possession. And under the 87th section, he stands in as good plight, with respect to his right of recovery, as he did at the death of the ancestor. The 34th section of the Revised Statutes (2 *R. S.* 298), is not reënacted in the Code, and is, therefore, repealed by § 73. It is probable that § 121 and § 87, supersede the necessity of the said § 34.

The effect of the substitution of the heirs as defendants will be, in case the plaintiff prevails, to cast upon the former the whole expense of the litigation. Thus, without any fault of their own, and without reference to the fact whether any assets are received by them, they become amerced in a heavy bill of costs. Such a result would scarcely have been anticipated, and was surely not intended by the legislature. Among the arguments urged against the late Court of Chancery, by the reformers of the Bentham school, there was none which was pressed with more effect than that which was based upon the interminable length and great expense of the actions in that court. It was said that children were sometimes born heirs to a chancery suit, and were saddled with costs which accrued before they were born. It is unfair to suppose that a legislature, which yielded to such arguments, and abolished the separate jurisdiction after the two courts were amalgamated, should extend to other actions the very abuses of which they so loudly complained. The duration and expense of chancery litigation were in part owing to the fact that the death of parties did not, as in common law actions, put a period to them. The remedy would seem to be to preserve the simplicity of the common law as far as practicable in all actions, and not suffer the principles which obtained in equity to be any further extended than was essential to preserve the rights of the

parties. The public good never required that the rule of survivorship should be extended to torts, when the action was by and against a sole party.

I am of opinion that this action abated by the death of the original defendant; and consequently the order of the special term, substituting the infant heirs as defendants is erroneous and should be reversed.

But if I am wrong in the foregoing, there is another view of the subject, which leads to the same result.

The infant heirs of a deceased defendant in an action to recover land should not be substituted as defendants, on the ground that they are successors in interest of the defendant, unless they are in possession of the premises sought to be recovered, or refuse to let the plaintiff enter or take possession. It does not appear by the petition that they are in possession, or that they assert any claims hostile to the plaintiff. The infants do not ask to be substituted. As the application comes from the plaintiff, he should show that he can not obtain possession without making them parties. They should have had an opportunity to elect whether they would continue the action by being made parties or abandon it. Mr. Fish, the attorney of the ancestor, ceased to be the attorney on the death of his client. He was in no sense the attorney of the infants. The order has been taken against them without any notice, and for that reason it should be reversed.

A guardian should have been first appointed for the infants, under section 116 of the Code, and then the papers for the motion should have been served on him.

Order of special term reversed.

SUPREME COURT.

STROUT AND OTHERS agt. CURRAN.

When a pleading is regularly served and within the proper time, though defective, so that the only question is upon its *sufficiency*, it can not be disregarded as a nullity.

Albany Special Term, December 1851. *Motion to set aside judgment, &c. for irregularity.* The action was brought upon a promissory note. A copy of the complaint, not verified, was served with the summons. Within the time for answering, the defendant served an answer denying generally all the allegations in the complaint. The next day the plaintiffs' attorney returned the answer served on him to the defendant's attorney, and perfected judgment for want of an answer, and issued execution

J. A. MILLARD, *for Plaintiffs.*

J. ROMEYN, *for Defendant.*

HARRIS, Justice.—The plaintiffs' attorney had no right to determine for himself whether the answer with which he had been served was sufficient as a pleading. When a pleading is served after the time allowed for such service, or when, in any other respect there is a defect of service, the opposite party may, at his peril, disregard the pleading served. Thus, if it be required that an answer should be verified by the oath of the party, and an answer is served without such verification, it may be returned and the plaintiff may proceed for the want of an answer.

But this rule of practice is not applicable to a defect in the pleading itself. When the pleading is regularly served, and within the proper time, so that the only question is upon its sufficiency, it can not be disregarded. The answer, in this case, was undoubtedly defective, and would probably have been stricken out upon a proper application. The difficulty is that the plaintiff has assumed that it was no answer. He has thus given judgment for himself. This he had no right to do. The proceedings are, therefore, irregular and must be set aside. The defendant is also entitled to costs of the motion.

SUPREME COURT.

GREGORY AND FOOT agt. LEVY AND SEDGWICK.

Sureties in an undertaking can not raise the question of the liability of their principal to arrest.

The Code has made no change in the law as to the liability of sureties. It points out the mode of exonerating them. But their responsibility after return of *non est* upon *ca. sa.* remains as formerly.

Oswego General Term, April 1852—ALLEN, HUBBARD and PRATT, *Justices. Demurrer to answer.* The complaint in this action sets forth that on the 3d day of June 1851, the plaintiffs commenced an action against one Sylvester Levy, to recover a debt; that at the time of issuing the summons, an order of arrest was obtained under subdivision 4 of section 179 of the Code; that Levy was arrested thereon and discharged from custody upon the defendants in this action executing an undertaking of bail under section 187; that judgment was rendered against Levy, the debtor, and executions against his property and person duly issued and returned unsatisfied; whereupon this action was brought upon the undertaking against the defendants as sureties.

In their answer the defendants allege that the action against Sylvester Levy was to recover the amount of two promissory notes, and that the complaint therein contained no allegation that the debt was fraudulently contracted, or any allegation showing that Levy was liable to arrest, or that the action was one in which an arrest might have been made upon an order under § 179 of the Code.

The plaintiffs demurred to the answer for insufficiency, that it did not state facts constituting a defence to the action.

P. OUTWATER, *for the Plaintiffs.*

G. D. DILLAYE, *for the Defendants.*

By the Court, HUBBARD, Justice.—The theory of the defendants' answer is that no breach of the undertaking can be alleged, because the record of judgment in the action against Sylvester Levy does not show that the action was one in which a personal

execution could issue, and that hence Levy was not bound to hold himself amenable to the *ca. sa.* which was issued and returned *non est inventus.*

Without deciding this precise question, applicable in a case where the debtor is himself interposing the objection, we think the demurrer must be sustained on the ground *that sureties of bail, can not raise the question of the liability of their principal to arrest.* They are estopped by their undertaking which imports that liability, and is in effect an acknowledgment of the bailable character of the action (24 *Wend.* 175; 8 *id.* 481–2; *Ld. Raym.* 1535). The principle upon which this doctrine is founded is, that exemption from imprisonment in actions upon contract under the statute is a *personal privilege*, which belongs to the debtor alone (*see* 19 *Wend.* 121, *and cases above cited*). That privilege may be waived by submitting to an arrest upon an order, and procuring bail. If waived the sureties to the recognizance can not be heard to interpose the debtor's personal exemption, or that the action was one in which the debtor might have claimed such exemption and procured a *vacatur* of the order of arrest. The law will presume against the sureties that the action against the debtor was in its nature bailable, or became so by waiver on the part of the debtor. The only mode of avoiding liability when a *ca. sa.* is returned *non est*, is for the sureties to surrender their principal under § 191 of the Code.

In this view of the case, it is not necessary to refer to the several authorities cited by the defendants' counsel, upon the question whether the judgment roll must, in terms, show that the action was one in which an order of arrest might have been made under the Code, in order to authorize the issuing a personal execution. The rights or remedies of the debtor are not now the subject of inquiry. In this case he was not a party to the undertaking, nor is he a defendant in this action. I will, however, allude to the case of Gridley agt. McCumber (5 *Howard*, 414), cited upon the argument, and affirmed upon appeal at general term in this district.

It was not affirmed upon any ground taken by the justice in special term in his opinion published in 5 *Howard, supra*, which can affect this case. It was affirmed upon the sole ground that

it appeared clearly that the action was brought to recover an indebtedness, concerning a portion of which there was no claim or pretence of fraud; and as to which the debtor was not liable to arrest or imprisonment. It was held, therefore, at general term that although the debtor had omitted to vacate the order of arrest, still he might move to rescind the *ca. sa.* for the reason that it was improperly issued. The question as to sureties did not arise.

The Code, I think, has made no change in the law to the liability of sureties. It points out the mode in which the debtor may obtain his discharge from arrest, and if bail is put in, the mode of exonerating the sureties. This is the extent of the change of the practice in this respect, the law affecting the responsibility of sureties after return of *non est* upon *ca. sa.* remains as formerly.

The demurrer, therefore, must be sustained, with leave to the defendants to amend their answer on payment of costs.

SUPREME COURT.

Smith and Fitch agt. Johnson.

The judge who makes an order appointing a referee to examine as to the property of a judgment debtor under § 209 of the Code, is *the judge* to whom the referee must certify his examination, and the one who must make the order for the appointment of a receiver. No other judge, out of court, has the power.

And this applies to county judges who make such orders.

At Chambers, July 1852. Motion for the appointment of a receiver upon the examination taken by the referee and certified under an order made by the county judge in proceedings supplementary to the execution. It was objected that the application should be made to the county judge who granted the order, and that no other judge had any authority under the provisions of the Code to make the appointment.

F. C. DINNINY, *for Plaintiffs.*

GEO. B. BRADLEY, *for Defendants.*

JOHNSON, Justice.—The objection is well taken. By referring to the Code (§ 292), it will be seen that in a case like this, the creditor after the return of execution unsatisfied, "is entitled to an order from a judge of the court," requiring the debtor to appear and answer concerning his property. By § 296, the party or witness may be required to attend before *the judge*, or before a referee appointed by *the court or judge;* and if before a referee, the examination shall be taken by the referee and certified to *the judge.*

By § 398, *the judge* may also by order appoint a receiver of the property of the judgment debtor. This clearly refers to the judge who granted the order, and before whom the examination was conducted or to whom it was certified by the referee. The referee is to certify the examination to the judge who grants the order. No other judge out of court has any authority or jurisdiction to appoint a receiver or make any order in the proceeding.

It is a power given by statute to *the judge*, and not to a judge or any judge (Merritt agt. Slocum, 6 *How. Pr. R.* 350).

Motion denied.

SUPREME COURT.

KEATOR agt. THE ULSTER AND DELAWARE PLANK ROAD COMPANY.

THE SAME agt. LOCKWOOD.

The Code, § 270, provides that any issue, in any cause, may be *referred* upon the *written consent* of the parties. The 271st section authorizes the reference of certain specified issues.

The question is this, where counsel for both parties at the circuit agree orally to refer a cause not referable under § 271, and the court make the order and appoint the referee, who proceeds with the hearing, can either party set aside the reference, because a *written consent* was not obtained? *Held*, not, because the agreement of the parties in the presence of the court, waived a written consent and made the reference valid and binding. They openly waived the right to a trial in any other way; and the right having once gone it could not be recovered.

Ulster Special Term, April 1851. *Motion to vacate an order made at the Ulster Circuit, referring these causes to a sole referee.* The causes were noticed, and were upon the calendar for trial. They were referable only by consent of parties. It was proposed, and finally agreed to by the counsel for both parties, that they should be referred, and the referee was agreed upon. The counsel for the plaintiffs then, in the presence of the defendants' counsel, in open court, moved for the reference and the motion was granted.

The cause was noticed for hearing on the 2d day of April, at which time one of the defendants' attorneys appeared before the referee, and applied for an adjournment, and the hearing was accordingly postponed until the 15th of April. Upon that day, the defendants' attorneys served papers for this motion to set aside the order of reference, on the ground that it had not been entered upon the *written consent* of the parties.

T. R. WESTBROOK, *for Plaintiff.*

J. C. FORSYTH, *for Defendants.*

HARRIS, Justice.—The 270th section of the Code provides that any issue, in any cause, may be referred, upon the *written con-*

sent of the parties. Even then, before the issue is legally referred, the reference must be ordered, and the referee appointed by the court (*Code*, § 273; Litchfield agt. Burwell, 5 *Howard*, 341). The 271st section of the Code authorizes the reference of certain specified issues, without the consent of parties. The case in hand is not provided for by either of these sections. There was no written consent of the parties, and it was not referable under the 271st section. It is therefore insisted that the reference was unauthorized and void. Formerly, such a reference was held to work a discontinuance of the action, and an arbitration of the subject matter of the reference (Dederick's adm'rs vs. Richley, 19 *Wend.* 108; same case, 2 *Hill*, 271). In 1845, the authority of the court to refer causes "by the consent of all parties," was extended to all personal actions (*Sess. Laws of* 1845, *p.* 163). And now, by the Code, any action whatever may be referred, upon the written consent of the parties.

The question here is whether, the court having power to refer upon written consent, it is in the power of the parties themselves to waive such written consent, so as to make the reference valid without it. If it can be done at all, it will not be denied that it has been so waived in this case. The defendants' attorneys agreed to the reference, in open court, and, when the motion to refer was made, they, tacitly at least, gave their consent. After this they appeared before the referee, without objection to the validity or regularity of the reference, and applied for, and obtained an adjournment of the hearing. If, therefore, it is possible to waive the necessity of written consent, the defendants will not complain if they are held to be concluded by their own acts.

Nothing is better settled than that a party may waive a constitutional or statutory provision for his benefit. Such waiver, too, may be by parol. In Baker vs. Braman (6 *Hill*, 47), it was held that proceedings to lay out a private road, which otherwise would have been unconstitutional and void, were rendered valid by the parol consent of the owner of the land. In Lee vs. Tillotson (24 *Wend.* 337,) a cause had been referred which it was insisted the parties had a right, by the constitution, to have tried by a jury. The parties had consented to the reference, and

the court said "the consent itself is a waiver of the objection, even if the constitution stood in the way (see also The People vs. Murray, 5 *Hill*, 468; Embury vs. Conner, 3 *Comst.* 511). It is always competent for a party to waive his right to a trial according to the common law. Though entitled to have twelve jurors, he may consent to a less number, and afterwards can not object to the regularity of the trial. A referee is required by law to take a prescribed oath before entering upon his duty, and yet, it often happens that no such oath is taken. If the parties proceed with the reference without objection, they are held to have waived their right to object. Numerous instances, familiar to every lawyer of experience, might be mentioned in which parties are estopped by their mere acquiescence, from taking advantage of irregular and even illegal and unconstitutional proceedings. The agreement of parties, in the presence of the court, in respect to the proceedings in a pending suit, have always been held to be binding. It will, indeed, be a sad condition of things, when it shall be otherwise. Why should the case under consideration be made an exception from the principle applicable to all such cases? The constitution guaranteed to the owner of the land, in Baker vs. Braman, that it should not be taken for a private road. He consented that it might be thus taken, and having consented, he was not at liberty to recall his consent. The law secured to the defendants in these suits the right to a trial by jury. They appeared in court and openly waived that right. The right is gone and can not be recovered.

The motion must be denied with costs.

SUPREME COURT.

GRAY AND OTHERS agt. GRISWOLD.

A defendant in an execution, from whose property the sheriff has collected money sufficient for the payment of it is not liable for interest on the judgment while the money is stayed in the sheriff's hands at the instance of a creditor of the defendant.

Where a sheriff had two executions against the same defendant, and collected from his property sufficient to pay the first execution in full, and the other in part, and then another creditor of the defendant obtained an order of this court forbidding the sheriff to pay over the money until a decision of a motion to set aside proceedings, which was afterwards denied, it was held that the plaintiff in the first execution was not entitled to an order, that the sheriff apply thereon, of the moneys in his hands a sum sufficient to pay the interest on the amount directed to be collected, while the order was in force.

When a sum was received by the sheriff sufficient to pay the first execution it was in law paid; and the balance in his hands the law at once appropriated upon the second execution, whereby it was paid *pro tanto*.

Cayuga Special Term, July 1852. This is a motion on the part of the plaintiffs that the sheriff of Wayne county be required to apply on the execution in this action of moneys in his hands the sum of $79·26. The motion is founded on the following facts: After the commencement of their action the plaintiffs obtained an attachment against the defendant, by virtue of which the sheriff seized certain property of the defendant. Judgment was afterwards obtained and the execution issued and delivered to the sheriff. Subsequent to the seizure under the attachment, another creditor of the defendant commenced an action against him, and obtained an attachment, under which the sheriff seized the same property, which action was prosecuted to judgment and an execution thereon was delivered to the sheriff. On the 17th day of February 1851, the sheriff had collected by sales under said executions, and from demands attached, a sum sufficient to satisfy the first execution, and more than the sum of $79·26 in addition, but not enough to satisfy the second execution. On the third of February 1851, an order of this court was served on the sheriff, forbidding him to pay over any moneys on either of said executions, until the decision of a motion to set aside said

attachments, which order was obtained by an attaching creditor, junior to those above named, and continued in force until the 13th January 1852, on which day the sheriff paid to the plaintiffs in this action the amount due upon their execution for principal and interest to the 17th of February 1851, but declined to pay interest after the day last named. The interest from the 17th February 1851 to the 13th January 1852, amounting to $79·26 is sought to be obtained by this motion.

W. Clark Jr., *for Plaintiffs.*

D. W. Parshall, *for 2d attaching creditor.*

T. R. Strong, Justice.—The effect of granting this motion would be to charge the defendant with the interest on the plaintiffs' judgment, after the sheriff had collected from his property sufficient to pay it, during the period the money was stayed in the sheriff's hands. Whatever should be taken to pay the interest would otherwise apply upon the second execution, and to that extent relieve the defendant from liability. No good reason is perceived why this loss should be imposed upon the defendant; on the contrary it appears to me it would be most unjust and oppressive. He did not procure the stay and is not responsible for it; he ought not, therefore, to suffer from it (see Gillespie vs. The Mayor of New York, 3 *Edward's Chan. Rep.* 512; Stevens vs. Barringer, 13 *Wend.* 639, *and cases cited*).

But the true view of this case, I apprehend, is that when the sheriff had realized a sufficient sum to pay the plaintiffs' execution, and which was applicable to its payment, the execution was in law satisfied. The office of the attachment and execution was performed, and their functions there ceased. Any surplus in the hands of the sheriff, the law at once applied on the second execution, and satisfied it to that extent. No debt then remained in favor of the plaintiffs against the defendant for interest to accrue upon, and there was no money belonging to the defendant in the hands of the sheriff (*Code*, § 237). In Lawrence vs. Murray (3 *Paige*, 400), the late chancellor said, "when the creditor seeks to enforce payment of his debt through the medium of the officers of courts, as soon as any part of the debt is collected under the order or process of the court, it is a payment *pro tanto*,

and interest can not afterwards be collected upon the amount thus received by the officer of the court." Of course if the whole debt is collected it is wholly paid.

If the position of the plaintiffs upon this motion is sound, upon the same principle, if there had been no surplus they might have been permitted to proceed with their execution and collect of the defendant the amount of their interest. Clearly that would not be tolerated in a case like the present.

As between the plaintiffs and the second attaching creditor, the former have no superior equity. They can not with any reason call upon him to relinquish any part of the surplus to which he has a legal right. The motion is denied.

SUPREME COURT.

SHEPARD agt. WALKER AND LEARNED.

In an action in the nature of a former creditor's bill, where the amount of the judgment which the plaintiff seeks to recover, or the matter in dispute is less than $100, the court have no jurisdiction; the complaint must be dismissed.

Neither the constitution or the Code have changed the law in this respect.

Onondaga Special Term, June 1852. In April 1852, the plaintiff recovered a judgment in this court against the defendant Walker, for $67·51. Execution was duly issued; it was returned unsatisfied, and the present action is in the nature of a creditor's bill to reach the interest of the debtor in certain real estate which it is alleged the debtor caused to be transferred to the defendant Learned in fraud of his creditors. It is alleged that Walker held a contract for the purchase of the land; that his interest in the land was worth $400; that he transferred the contract to defendant Learned, who has taken a conveyance of the land.

The defendant Learned now moves to dismiss the complaint as to him, upon the ground that the matter in dispute, exclusive of costs, does not exceed the value of one hundred dollars.

HILLIS & MORGAN, for defendant Learned, cited 2 *R. S.* 173, § 37, and *Judiciary act*, 1847, § 16.

C. L. ANDREWS, for plaintiff, cited 5 *J. Ch. R.* 276; 2 *R. S.* 173, § 37; *Constitution, art.* 6, § 3 and 5; *Code*, § 69.

MARVIN, Justice.—The plaintiff's counsel insists that "the matter in dispute" is the interest of the defendant Walker in the real estate conveyed to the defendant Learned. By section 37 (2 *R. S.* 173), it is declared that the Court of Chancery shall dismiss every suit concerning property when the matter in dispute, exclusive of costs, does not exceed in value one hundred dollars. In Douw vs. Sheldon (2 *Paige*, 323), the mortgage was given to secure the payment of $600; only $42 was due, and the chancellor dismissed the bill. In Swets vs. Williams (4 *Paige*, 364), the bill was by a creditor to collect a judgment. It was held that the *amount of the complainant's judgment*; and the amount of the defendant's property, as claimed by the complaint, should each exceed $100 to constitute a matter in dispute of which the court would take cognizance (see also Spear vs. Given, 9 *Paige*, 362).

It is clear that the late Court of Chancery would have dismissed this complaint. The amount claimed to be due upon the judgment is less than $100. It is insisted that the provision of the Revised Statutes referred to has been abrogated by the Constitution and the Code; that the Court of Chancery is abolished, and that this provision of the Revised Statutes is not applicable to the Supreme Court established under the present constitution, a court "having general jurisdiction in law and equity." The constitution did not affect the provision of the Revised Statutes, touching the question under consideration. The constitution simply declares that there shall be a Supreme Court, having general jurisdiction in law and equity (*art.* 6, § 3). And that the legislature shall have the same powers to alter and regulate the jurisdiction and proceedings in law and equity as they have heretofore possessed (*art.* 6, § 5). Has the legislature changed the law under consideration? By the judiciary act (*Sess. Laws* 1847, 327, § 14), it is declared that the Supreme Court shall possess the same powers, and exercise the same jurisdiction as is

now possessed and exercised by the present Supreme Court and Court of Chancery." "And all laws relating to the present Supreme Court and Court of Chancery, &c. and the jurisdiction, powers and duties of said courts, &c. shall be applicable to the Supreme Court organized by this act, &c. so far as the same can be so applied, and are consistent with the constitution and the provisions of this act." There is nothing in the constitution or judiciary act inconsistent with the provision of the Revised Statutes referred to.

The Supreme Court, under the judiciary act, had the same jurisdiction as the Court of Chancery formerly had; and the provisions of the Revised Statutes touching the powers and jurisdiction of the late Court of Chancery were applied to the Supreme Court. In my opinion the Code has not changed the law in the particular we are now considering. The Code has not attempted to abolish the distinction between law and equity; it has abolished the distinction between actions at law and suits in equity, and the forms of such actions. It has attempted to establish a uniform system of pleading and practice, whether the action is one in its nature requiring equitable relief, or one entitling the plaintiff to such judgment as was given in a court of law. We are to examine the case as stated in the complaint in connection with the judgment demanded and are to determine the nature and character of the action. If it is an action in which the rights of the parties, depend upon those principles of equity which have been long settled and acted upon in courts of equity, these principles are still applicable to the case, and the rights of the parties are determined by them. On the other hand, if the facts stated present a case in which the rights of the parties are governed by those principles of law formerly acted upon in courts of law, those principles are still applied and they determine the rights of the parties.

The great body of law, touching men's rights, remain unchanged, and this body of law, as a whole is consistent.

The commissioners in the first report, page 74, say: "It is no part of our purpose to present the principle of an union of law and equity jurisdiction, upón a broader basis than that which has reference to *their forms of proceeding*." They also say,

"it is only necessary that we should take care not to encroach upon substantial rights." "Keeping in view the distinction between rights on the one hand, and the means of their ascertainment and enforcement on the other, the only question is whether a *mode of proceeding*, common to all civil controversies, whether known as legal or equitable can be safely and conveniently prescribed" (see the cases collected in note to § 69, *Voorhies' Code*).

In the present case the object of the action is to collect a judgment from property, the apparent title to which is not in the debtor; but the plaintiff states facts which would entitle him to the aid of the court in reaching and applying the property, but for the fact that his judgment is less than one hundred dollars. In such a case the general law declares that the *suit* (now action) shall be dismissed. The plaintiff shall not have this particular remedy in a case where the matter in dispute does not exceed in value one hundred dollars. Other remedies remain open to him, but from this remedy he is barred. Neither the Constitution or the Code has, in my opinion, changed the law in that respect.

The motion must be granted, with $10 costs.

SUPREME COURT.

The People agt. Lee.

Where there are three claimants to a tract of land by titles hostile to each other, one of whom is in possession, and separate actions are brought against him by the others, which are prosecuted to judgment and execution, and the plaintiff in the first action is put into possession by the sheriff, the court will, on his application, grant a perpetual stay of proceedings on the execution in the second action, as against him. He is entitled to retain the possession thus acquired, until in an action against him, a title superior to his is established.

Cayuga Special Term, July 1852. Motion by Jedediah H. Stark and wife to set aside the judgment and execution in this

action; and if that shall not be granted, that they be let in to defend, &c. upon the following facts: In January 1852, the moving parties commenced an action against the present defendant, to recover possession of about seventy-five acres of land, claiming in their complaint that the wife was the owner thereof in fee. The defendant answered the complaint; and by his answer controverted the title alleged therein, and set up title in himself. The action was tried in May 1852, when a verdict was rendered against the defendant, upon which a judgment was entered on the 8th of that month. A writ of possession was thereupon issued under which the defendant was turned out, and Mrs. Stark put in possession of the premises. This action was commenced the 9th of April 1852, to recover the possession of the same premises, and a judgment by default was entered therein against the defendant on the 31st of May, on which a writ of possession has been issued, and is now in the hands of the sheriff. It does not appear that the relation of landlord and tenant existed, or that there was any privity of estate between the defendant and Mrs. Stark, or the people; but it rather appears that the several claims were hostile to each other.

A. WORDEN, *for Stark and wife.*

S. C. HART, *for Plaintiffs.*

T. R. STRONG, Justice.—It would be manifestly unjust to allow Mrs. Stark to be turned out of the possession of the premises under the judgment in this action. Having brought her action in good faith, before the present action was commenced, and established her title as against the defendant, and been put in possession under the process of this court, she should be protected in her possession, as against the plaintiffs, until they establish a title superior to hers (Jones vs. Childs, 2 *Dana*, 25). The judgment in this action determines nothing as to her title(2 *R. S.* 309, § 36).

Under section 122 of the Code, the court might grant relief by directing that Mrs. Stark be made a party defendant in this action, and brought in by a proper amendment, but I think the court has the power, and that the more appropriate remedy in this case is, to order proceedings on the judgment and execution

perpetually stayed, as against Mrs. Stark and persons claiming under her, leaving the plaintiffs to commence a new action, if they think proper, against any person or persons in possession. Such an order is accordingly granted.

SUPREME COURT.

Voorhies agt. Scofield.

The cause of action stated in the complaint, should control the form of the notice in the summons (*This agrees with the case of Field and Stone agt. Morse, ante page* 12.)

Where the plaintiff served a summons and complaint together, the summons containing a notice that if the defendant failed to answer the complaint, the plaintiff would take judgment against him for $150, with interest, &c. The facts stated in the complaint showing a cause of action for wrongfully taking, detaining and converting personal property. *Held*, that the summons was irregular and was set aside with costs, with leave to amend on terms.

It seems, that although it has been considered as a settled rule that an appearance generally, in the cause, waives irregularity in the process by which the party is brought into court (see Webb agt. Mott, 6 *How. Pr. R.* 439); yet, under the Code, this rule in certain cases, may not apply. For instance, a summons is served, without a complaint, with a notice for judgment conforming to one of the subdivisions of § 129, the defendant serves a notice of retainer generally, for he must do this in order to get a copy of the complaint, and when the complaint is served, he finds an entire variance between the notice in the summons and the cause of action stated in the complaint, the latter controlling the cause of action. Is he by his general retainer deprived of moving to set aside the summons for irregularity? Supposed not.

Onondaga Special Term, June 1852. *Motion to set aside the summons upon the ground that the notice inserted in it is improper.* The action was commenced by the service of the summons and complaint on the 4th May. The summons contains the notice that if the defendant fails to answer the complaint, the plaintiff will take judgment against him for $150, with interest, &c. The facts stated in the complaint show a cause of action for wrongfully taking, detaining and converting personal property.

On the 24th day of May the defendant's attorneys served upon the plaintiff's attorneys copies affidavits and notice of this motion, and also notice of retainer by the defendant and that they appeared for him. The service was made through the post office.

JAMES NOXON, *for Defendant.*

Q. A. JOHNSON, *for Plaintiff.*

MARVIN, Justice.—Civil actions are commenced by the service of a summons. The requisites common to all summons are given in section 128, and then in section 129 it is provided that the plaintiff shall also insert in the summons *a notice.* 1, in action, upon contract for the recovery of money only, that he will take judgment for a sum specified therein, if the defendant fails to answer. 2, in other actions, if the defendant fails to answer, he will *apply to the court* for the relief demanded in the complaint.

A copy of the complaint need not be served with the summons. It may, however, be served at the same time. In this case they were served together, and from the complaint it is clear that the action is not one "*arising on contract.*" The notice in the summons is not, therefore, in conformity with the requirements of the Code. The notice should have been of an application to the court for the relief demanded in the complaint. It was not denied upon the argument, that there was not a proper conformity between the summons and complaint, but the position was taken that the motion should have been to set aside the complaint. We look to the facts stated in the complaint to ascertain the character of the action, and in an action arising on contract for the recovery of money only, the notice in the summons is to be in one form, and in other actions, in another form. How are we to know, when the summons contains one of the two prescribed notices, whether it is the right one, until we examine the complaint? The complaint, or cause of action stated in it, is to control the form of the notice in the summons. The motion to set aside the summons in this case is, I think, the proper motion. True it may be argued that as the plaintiff, in the summons, has indicated the nature of the action, he should not be permitted to deliver thereafter a complaint in another class of actions, and

that such complaint should be set aside, and he should be driven to conform his complaint to the summons. In my opinion, however, it will better accord with the system of the Code to regard the action as stated in the complaint, as controlling the form of the notice in the summons.

Cases may occur where it may be proper to move to set aside a complaint delivered after the service of the summons upon the ground that the action stated in it, belongs to a class different from that indicated in the summons, and is not the action intended by the summons. In the present case the summons and complaint were served together, and the action, as disclosed in the complaint, should control the form of the summons. It is not necessary to express an opinion in a case presenting other and different circumstances.

Since the motion in this case was submitted, Webb agt. Mott (6 *How. Pr. R.* 439), has been published. In that case, the summons and complaint were served together. They differed, as in the present case. The defendant appeared generally by his attorney, and *subsequently* gave notice of the motion to set aside the summons and complaint for irregularity. The learned justice held, that by appearing generally in the action, the defendant had waived the irregularity.

The case under consideration differs from Webb agt. Mott in this respect; there the defendant, after he was apprised of the irregularity appeared generally to the action, without objecting to the irregularity. Such general appearance, under the circumstances, might well be regarded as a waiver of the irregularity. In the present case, however, the first act of the defendant was a resort to measures to bring the question of irregularity before the court. The papers for that purpose were prepared, they were served with a notice of this motion, and accompanying these papers and notice, is the notice of retainer and appearance. Here is no waiver of the irregularity.

In Webb agt. Mott, the principle seems to be advanced that a general appearance of the defendant in the action will be a waiver of the irregularity in the summons. Will such general appearance be regarded as a waiver in a case where the summons is served without the complaint and the defendant appears before

the complaint is served, if the notice in the summons accords with one of the subdivisions of section 129, and the action as disclosed by the complaint comes under the other subdivision of that section. In other words if the summons upon its face is such as the Code authorizes and the defendant appears and then receives a complaint stating a cause of action, not indicated in the notice in the summons, has he no right to move to set aside the complaint or the summons? Has he, by appearance, waived the right to present the question of irregularity? It seems to me not. We can hardly hold that a party waives an irregularity until he has had an *opportunity* of knowing that one has been committed. When the summons is served it is regular upon its face. It contains one of the notices authorized by the Code. Whether it is the right notice, can not be known until the complaint is served, and the defendant is not entitled to the service of a copy of the complaint, until he has caused notice of appearance to be given.

I have examined the authorities referred to in Webb agt. Mott, and they are cases where the defect or irregularity *appeared* in the process or summons. The general rule undoubtedly is that a party must take the earliest advantage of the irregularity of his adversary, and if he takes any step in the progress of the cause after the irregularity is apparent, he waives the irregularity. This is a very useful rule in practice. But it seems to me that it is not applicable to a case where the defendant appears, upon the service of a summons, which upon its face does not appear to be irregular, and which irregularity can not be known until the complaint is seen. It is only irregular as tested by the cause of action set out in the complaint. When this appears the defendant may move.

In the case under consideration the motion must be granted with $7 costs, unless the plaintiff shall in ten days amend the summons and serve a copy thereof upon the defendant's attorneys and pay the $7 costs. The defendant is to have twenty days after service of the amended summons to answer the complaint.

SUPREME COURT.

Walker agt. Burnham.

When a constable executes a warrant, issued and delivered to him by the colonel of the regiment for the collection of military fines, in so doing he acts *under the command* of an officer of the militia, and if prosecuted therefor and a judgment is given in the action against the plaintiff, the constable shall recover *treble costs*, under 1 *R. S.* 324, § 6.

The cases holding that double costs are *not* repealed by the Code, collected and approved.

The words "treble costs" in the militia statute are to be understood literally, and the costs are to be *actually trebled*. The double costs, so called, given to public officers (2 *R. S.* 617, § 24), are more strictly *increased* costs.

Chenango Special Term, August 1852. *Motion by defendant for treble costs.* The action was brought to recover the possession of personal property taken by the defendant, a constable, by virtue of a warrant issued by John D. Shaul, colonel of the 39th regiment, for the collection of military fines.

Upon the trial at the Otsego June circuit, the plaintiff was non suited for the reason that *replevin* would not lie in such case. The defendant now moves for treble costs under the militia law, he having obtained the necessary certificate from the judge who tried the cause.

James E. Dewey, for defendant, insisted that under the acts organizing the militia, the defendant, although a civil officer, acted under the *command of the colonel*, within the spirit and letter of the statute (1 *R. S.* 324, § 6), and not under process issued by any court.

He also insisted that the words "treble costs" in that section (§ 6), being unexplained or uncontrolled by the statute itself, and there being no statute defining the words "double" or "treble costs," were to be understood *literally* by the courts and entitled the defendant to a recovery of thrice the amount of his single costs and disbursements.

Lewis R. Palmer, for plaintiff, opposed the motion, insisting that the defendant acted, not under the command of a military officer, but by virtue of his office only.

Also, that the statute defined "double costs" as the common costs and one half in addition, and that the practice was to apply the same principle to *treble* costs, by adding seventy-five per cent only to the common costs (*Graham's Practice*).

MASON, Justice.—I am of opinion that the defendant in executing this military warrant, issued by the colonel of the regiment, is to be deemed a person acting under the command of a militia officer, within the meaning and intent of § 6 (1 *R. S.* 324), and that as he was prosecuted in this action for an act done by him while acting under such command, he is entitled to treble costs (1 *R. S.* 324, § 6). The present statute in relation to costs has not, in my opinion, repealed this statute, as will be seen by reference to the following cases (Calkins agt. Williams, 5 *How. Pr. R.* 393; Calkins agt. Williams, 5 *id.* 395; Murray agt. Haskins, 4 *id.* 263; Chadwick agt. Brother, 4 *id.* 283; Westervelt ads. Nelson, 8 *Legal Observer*, 173; Barber agt. Crossett, 6 *How. Pr. R.* 45; Foster agt. Cleaveland, 6 *id.* 253; Cheney vs. Windsor, 5 *Denio's Rep.* 96; Fuller vs. Wilcox, 19 *Wend. R.* 351, 352).

When *treble* damages are given by statute they are to be actually trebled (25 *Wend.* 420; 1 *Denio*, 639); and so when the statute gives treble costs they are to be actually trebled (Dunbar vs. Hitchcock, 5 *Taunt. R.* 820; 1 *Eng. Com. Law R.* 279; 2 *Rawle R.* 201; 3 *Yeates' R.* 82; 5 *Halst. R.* 145; 1 *Lord Raymond's R.* 13); and the same was true as to double costs before the Revised Statutes (2 *Dunlop's Pr.* 731; *Graham's Pr.* 1*st ed.* 591; McFarland vs. Crary, 6 *Wend. R.* 303, 311, 321). The Revised Statutes, giving to public officers an *increase* of costs, have fixed it at the taxed costs and one half in addition (2 *R. S.* 617, § 24); and yet this is called double costs, but it is not so, strictly (19 *Wend.* 352; 5 *id.* 93; 25 *id.* 251; 1 *Hill*, 673). BRONSON, J. says, in the latter case, the old statute gave double costs, but the present statute gives *increased* costs. I am of opinion, therefore, that the defendant is entitled to treble costs, by which I mean the costs actually trebled; but no costs on this motion are given. Motion granted.

SUPREME COURT.

Thomas and Plumb Overseers of the Poor of the town of Homer agt. Harrop.

A plaintiff can not demur to an answer, which does not purport to do more than deny some of the allegations of the complaint.

The answer must set up new matter constituting a defence and requiring a reply, to authorize a demurrer (*Code*, § 153).

A defendant called upon to answer under oath may avail himself of the well settled doctrine, that no man is bound to accuse himself of any crime, or to furnish any evidence to convict himself thereof (*Const. art.* 1, § 6).

Cortland Special Term, July 1852. *Demurrer to the Answer.* This is an action brought to recover of the defendant certain penalties for violation of the excise law regulating inns and taverns. The complaint alleges that plaintiffs are overseers of the poor of the town of Homer in the county of Cortland, and that the defendant has sold spirituous and intoxicating liquors in said town without having a license therefor, and states time, &c. The complaint is on oath. The defendant answers on oath, and admits that the plaintiffs are overseers of the poor of said town, and for further answer says that he can not answer any allegations of the complaint without the hazard of accusing himself of a misdemeanor and criminating himself, and requests that his answer may be deemed a denial of the complaint. To this answer the plaintiffs have demurred.

H. L. Ballard, *for Defendant.*

R. H. Duell, *for Plaintiffs.*

Mason, Justice.—The plaintiffs in this case have mistaken their remedy in demurring to this answer. They should either have moved to strike out the answer and for judgment, or else noticed the cause for trial at the circuit and applied for judgment there. The plaintiff can not demur to an answer which does not purport to do more than deny some of the allegations of the complaint. It is only where the answer sets up new matter constituting a defence, and which would require a reply from

the plaintiff that he can, under the present system, demur to the answer. The 153d section of the Code settles this question, and only allows the demurrer in the case above stated. Indeed the plaintiff could never, under our former system of pleading, demur to the general issue, and such is the legal effect of an answer which barely denies the allegations of the complaint. The demurrer in this case, in legal effect, is that the defendant has not denied a single allegation of the complaint, and it seems to me this is a strange point for the plaintiffs to make. It is not necessary to decide whether this is a good answer as a denial of the allegations of the complaint. I am inclined to think, however, the answer should be allowed to stand, and be deemed to put the plaintiff to the proof of his case.

The maxim of the common law is, "*Nemo tenetur se ipsum prodere*," and is founded on the fundamental principles of constitutional right. This doctrine was firmly settled and incorporated into the common law of England at an early day, and was brought to this country by our ancestors, and has been steadfastly maintained as amongst the most inestimable rights of the citizens of this state. This doctrine, that no man is bound to accuse himself of any crime, or to furnish any evidence to convict himself thereof, is now the fundamental law of this state (§ 6 *of Art.* 1 *of the Constitution*). The same provision was inserted in the constitution of 1821. This principle with us is, therefore, placed beyond the power of legislative encroachment, and our courts have held under the Code of 1848 and 1849, that no such encroachment was attempted by the provision requiring the defendant to swear to his answer in a civil action (Hill vs. Muller, 2 *Sanf. S. C. R.* 684; White vs. Cummings, 3 *id.* 716; Clapper vs. Fitzpatrick, 3 *How, Pr. R.* 314; Bailey vs. Dean, 5 *Barb. R.* 297); and although the Code of 1851 would seem to throw some obscurity over this subject, yet I can not think it was the intention of the legislature to interfere with this constitutional right of the citizen, and I think we may safely hold that this last amendment is not repugnant to the doctrines contained in the adjudications under the Codes of 1848 and 1849, above referred to; and such is the opinion expressed by Whittaker in his new practice, page 164. The demurrer in this case

must be overruled, but as the answer is at most but a denial of the complaint, and not therefore requiring a reply, I do not see how he can have a judgment in the action against the plaintiffs, unless he prevails upon the issue of fact (6 *How. Pr. R.* 113).

SUPREME COURT.

White, Receiver &c. agt. Bennett and Tarbell.

Where a complaint is served without verification, and the answer, denying the material allegations of the complaint, but setting up no new matter, is also served without verification, the plaintiff can not subsequently, on an affidavit of verification of the complaint merely, move to strike out the answer as false.

To protect himself against a false answer, denying his allegations, he must assert them under oath.

It seems, that on a motion to strike out an answer as false, it must be shown affirmatively by affidavit, other than an affidavit of verification of the complaint, that the answer is false.

Albany Special Term, June 1852. This action was brought upon several notes of which the defendant Bennett was alleged to be the maker, and the defendant Tarbell, endorser. Copies of the complaint, purporting to have been verified, were served on the defendants on the 27th of May. The complaint had not, in fact, been verified. On the 29th of May the defendants served their answer without a verification. On the 2d of June the plaintiff verified the complaint and his attorney served on the defendants' attorneys a copy of the verification, with notice of a motion to strike out the answer as false and unverified. The answer denies the execution of the notes by the defendants, and also deny that they were duly protested, but states no new matter.

W. Barnes, *for Plaintiff.*

N. G. King, *for Defendants.*

Harris, Justice.—When the complaint was served on the 27th of May, it had not, in fact, been verified by the plaintiff, and of

course, the defendants were not bound to verify their answer. The plaintiff's attorney now insists that by his subsequent verification of the complaint, he has shown the answer to be *false*, and that, therefore, he is entitled to judgment. But there are several reasons why the motion can not be granted.

The plaintiff's counsel supposes that, having shown the answer to be untrue, it must be stricken out as a *sham answer or defence;* and he relies upon the case of Mier vs. Cartledge (2 *Code Rep.* 125), as an authority sustaining this position. The views expressed by the learned judge who delivered the judgment of the court in that case, do certainly go the length of holding that an answer, though it merely deny the allegations of the complaint, may be stricken out as *false.* Whatever my own views of the question, I should feel bound by the opinion thus expressed, at a general term, were it not that it appears from the report of the case, that the point was not, in fact, before the court. The case was decided upon a different question. The answer in that case was, in fact, verified as required by the Code. The plaintiff undertook to satisfy the court that, notwithstanding such verification, the answer was false. In this, at the special term, he succeeded; but, upon appeal, the decision was, very properly, reversed by the same judge who had heard the motion at special term, on the ground that, when a pleading is duly verified, a motion to strike it out, *as false,* can not be entertained. This is the extent to which that case is to be regarded as authority.

By the 152d section of the Code, sham answers or defences are to be stricken out, on motion. The section but adopts the old practice in this respect. Sham pleadings, by which I understand those which are fictitious or imaginary, devised by the ingenuity of the pleader without regard to the facts really existing in the case, have always been stricken out, on motion. But this practice has never been applied to a pleading which, without alleging any new matter, merely denies some allegation in the pleading which it purports to answer. Such a pleading can not, in the sense in which the term is used, be regarded as a *sham pleading* (see Darrow agt. Miller, 5 *How. Pr. R.* 247). In the case last cited, Mr. Justice SILL has very clearly distinguished between the office of the 152d section of the Code, which

relates to *sham* pleadings, and the 247th section, relating to *frivolous* pleadings.

There is less reason for extending the practice in respect to sham answers to those which merely put in issue the allegations of the complaint *now*, than there was under *the former practice. Then*, as there was no mode of compelling the defendant to verify his answer, he might always put the plaintiff to the proof of his allegations. But *now*, the plaintiff has it in his power to secure an answer upon oath, and if he is subjected to the delay or inconvenience of an answer denying facts which could not be denied under oath, he alone is in fault. When he has omitted this precaution, I do not think he ought to be heard, on motion, to question the good faith of the pleading which merely denies the truth of what he has asserted.

But again, the plaintiff has made no affidavit showing affirmatively that the answer is false. The affidavit simply verifies the complaint in the manner prescribed by the Code, and upon this affidavit, the plaintiff's counsel seeks to have it inferred by the court that the answer which puts in issue some of the facts thus verified, must be false. This may be very plausible as an argument, but it would certainly be novel in practice. The logical inference may be very correct, but the practical result of such a rule would be very inconvenient. The motion must be denied with costs, but the plaintiff may have leave, if he think fit, upon the payment of the costs of the motion, to serve an amended complaint, duly verified, within ten days, which the defendants will be required to answer in the usual time.

SUPREME COURT.

PLUMMER agt. PLUMMER.

It is not a sufficient compliance with § 383 of the Code, authorizing judgments to be taken by confession, to describe a promissory note, without setting out the consideration of the note.

Chenango Special Term, August 1852. This was a motion made at Cortland special term in July 1852, by Moses Sousa and others, junior judgment creditors of William H. Plummer, to set aside an older judgment confessed by Wm. H. Plummer to Sarah R. Plummer.

JEROME ROWE, *for Motion.*

WILLIAM MARSH, *Contra.*

MASON, Justice.—The plaintiff in this suit has not complied with the requirements of § 383 of the Code, in entering his judgment. The object of this section was to prevent abuse and fraud in the confession of judgments. This section was adopted by the legislature precisely as reported by the code commissioners; and they state in their report that it is deemed expedient in order to prevent abuse, to require a statement of the true grounds and consideration of the judgment to be made and sworn to, and to have this a part of the judgment roll, so that its purpose and intent can not be denied or concealed. They add, not only are judgments by confession perverted to fraudulent ends under the existing laws, but the form of confessing the judgment is an idle ceremony (see *Report of Commissioners, page* 237). Such being the object and design of the statute, and it being for the protection of the creditors of the judgment debtor, its requirements must be complied with, or it will be deemed fraudulent as regards other judgment creditors, and as to their judgments will be set aside (Lawless vs. Hackett, 16 *J. R.* 149; Brinkerhoof vs. Marvin, 5 *Johns. Ch. R.* 320, 325 and 326).

That the statement in this case is not such an one as the statute under consideration contemplates, needs no argument to prove. The statute provides that if the judgment confessed be for money due, or to become due, the statement in writing must

state concisely the facts out of which it arose, and must show that the sum confessed therefor is justly due or to become due, &c. (*Code*, § 383). The statement in the case under consideration is as follows: "This confession is for a debt justly due to the plaintiff arising upon the following facts; a promissory note payable to the plaintiff for the sum of $250, dated on or about the 14th day of January 1850, and payable one year after date, with interest." This is not a statement of the facts out of which the plaintiff's debt arose. It shows nothing of the consideration of this judgment except that it was confessed upon a promissory note given by the defendant to the plaintiff. Now, unless this note was given for some valid consideration the plaintiff's judgment is fraudulent as to creditors, and one of the most material facts to be stated, therefore, is the consideration of the note. The statute would subserve none of the useful purposes contemplated by its framers, if we allow such a statement to answer its requirements. The fraudulent debtor would only have to concoct a note without consideration, and then state, as the defendant in this case has done, that the facts out of which the plaintiff's debt arose is the note, and he has literally evaded the statute. This statute should receive a liberal construction, such an one as will give to it the effect designed by its framers. But the language of the statute is too plain to admit of any reasonable doubt as to its construction. It can not be doubted, I think, that when the legislature required the defendant to state concisely the facts out of which his debt arose, that they intended to require him to state the consideration thereof. This provision of the statute is not merely directory, as was said by GRIDLEY, Justice, in regard to another subdivision of the same section (5 *How. Pr. R.* 381). This provision being for the protection of creditors, and to prevent fraud in the confession of judgments, the omission to make the statement required by the statute must be held to invalidate the judgment (Lawless vs. Hackett, 16 *J. R.* 149). I therefore direct the clerk of Tompkins county to enter an order in this suit declaring the same fraudulent as regards the judgments contained in the moving papers, and as regards those judgments the plaintiff's judgments and execution be set aside with $10 costs of this motion.

SUPREME COURT.

ADSIT Appellant agt. WILSON AND CHAMBERLAIN Respondents.

On appeal from a justice's judgment to the County Court, under § 366 of the Code, the latter court have no power or authority to reverse or affirm such judgment on *mere questions of fact* found by the evidence before the justice or a jury. Consequently this court can not, on appeal from the judgment of the County Court, review such evidence on mere questions of fact.

The law does not regard the judges as possessing any superior qualifications, over jurors, for judging of facts, or the weight or force of evidence of facts. It is a familiar and safe principle, that facts are to be tried by jury, and that the mere facts of a cause when once fully and fairly tried, are not to be reviewed. And this rule applies to the finding of facts by any tribunal having jurisdiction, such as referees, arbitrators and justices of the peace, &c.

The words "of fact" added to this section, in 1851, do not increase the powers of the County Courts over trials of fact in Justices' Courts. The term "error of fact," does not refer to any error or mistake of the jury in finding the facts; it has a well settled legal meaning, which is quite different.

Where testimony is offered, the relevancy of which can not be seen, and where it is not clearly on a cross-examination, it is the duty of the party who offers the evidence, when objected to, to point out some legitimate purpose for which he offers it, or the court may properly reject it.

Chautauque General Term, September 1852. *Present,* TAGGART, *P. J.,* MARVIN, HOYT and MULLETT, *Justices. Appeal from a judgment of the County Court of Cattaraugus county, reversing a judgment of a Justice's Court.* The action before the justice was commenced the 16th day of December 1849, and was tried by the justice and a jury, February 5th, 1850. The plaintiff complained of the defendants for taking and converting to their own use a horse of the plaintiff of the value of $75, and claimed damages to $100. The defendants, by their answer, denied "each and every allegation contained in the complaint," and for further answer set up a judgment, recovered by Wilson, one of the defendants, in a Justice's Court, against one John Adsit, an execution thereon, the delivery of the execution to Chamberlain, the other defendant, as a constable, to be executed, and justified the taking and sale of the horse by virtue of the judgment and execution. Upon the trial before the justice, the

plaintiff proved, in substance, the taking of the horse by Chamberlain from the plaintiff's stable, by the direction of Wilson, on the last day of November 1849; the sale of the horse by the constable, and that the plaintiff forbade the taking and sale of the horse. It appeared that the horse was brought to the plaintiff's by John Adsit, who resided about twenty miles off, the day before he was taken by the constable. The important question of fact to be tried was, whether the horse belonged to John Adsit, so as to be subject to the execution against him, or whether he belonged to the plaintiff. Much evidence was given upon this question, by both parties, upon which the jury found a verdict for the plaintiff for $38 damages, for which the justice gave judgment for the plaintiff, with his costs. Upon an appeal to the County Court, all the proceedings and testimony had before the justice, as well as his judgment, were returned, and the County Court reversed the judgment, upon certain legal propositions decided by the county judge, and which are referred to in the opinion of this court. The judgment of the County Court is now brought here by appeal.

S. S. Springer, *for Appellant.*

W. H. Wood, *for Respondent*

By the Court, Mullett, Justice.—This is an appeal from a judgment of a County Court, reversing a judgment of a court of a justice of the peace, on appeal. The County Court, as appears by the judge's written opinion, reversed the judgment of the Justice's Court, for certain alleged errors in law, clearly specified in the opinion; but one of the reasons, if not the principal reason, urged in this court, for sustaining the judgment of reversal is, that the verdict in the Justice's Court was against the evidence, and the County Court should have reversed, or was right in reversing the judgment of the Justice's Court for that reason. That the 366th section of the Code of 1851, authorizes the County Courts to reverse the judgments of courts of justices of the peace, for *errors of fact* as well as errors of law. As by the Code of procedure, the justice on an appeal to a County Court, is required to make a return to the appellate court of the testimony, proceed-

ings and judgment before him, and the County Court, upon the hearing of the appeal, is directed to give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits; and is authorized to affirm or reverse the judgment of the court below, in whole or in part, and as to any or all the parties, and for error of *law or fact*, it seems to be supposed that an appeal from a judgment of a County Court, affirming or reversing a judgment of a Justice's Court, necessarily brings to this court, for examination and review, all the testimony taken before the justice, and the conclusions of fact founded on that testimony, as the subject matter brought before the County Court for review, and therefore embraced by the judgment of that court, whether that court really made any decision on that subject or not. This could not have been the intention of the commissioners of the Code, or of the legislature. They could not have contemplated a system which would require the questions of fact, tried in all the Justices' Courts in the state, to be critically examined and reviewed upon the evidence, by the County Courts, and then again reëxamined on appeal to this court. Besides the expense, delay and inconvenience of such a system, it would be useless in contemplation of law. The law does not regard the judges as possessing any superior qualification over jurors, for judging of facts, or the weight or force of evidence of facts. It is a safe and favorite principle of our jurisprudence, that facts are to be tried by jury, and that the mere facts of a cause, when once fully and fairly tried, are not to be reviewed. This rule applies to the finding of facts by any tribunal or body having jurisdiction to try the facts of a case, such as referees, arbitrators, justices of the peace, when they try causes without a jury, &c. It is the legal duty of the courts to see that issues of fact in their courts, are fully and fairly tried; and in courts of record, if the verdict or finding of the facts, is so clearly without evidence, or against the evidence, as to satisfy the court that there is strong probable ground to believe that the merits have not been fully and fairly discussed, or that the jury have given their verdict under a misconception of the law, or under any improper extraneous influence, and that great injustice has been done, the court will set aside the verdict, not for the pur-

pose of assuming the trial of the facts themselves, but for the purpose of granting a new trial by another jury, or by other triors, under circumstances more favorable to a just result. This proceeding is well known in the practice of courts of record, as the granting of new trials on the merits. When there is evidence on both sides and the correctness of the verdict, or finding of the facts is merely doubtful; in short, when the only complaint against the finding of the facts is that the triors did not correctly weigh or appreciate the evidence, the courts have no authority to interfere with the result (*Gra. Pr. 2d ed.* 631 to 633, and the cases there cited; *Gra. on New Trials*, and the cases there cited).

This doctrine was applied by the Supreme Court to the review of justices' judgments on certiorari under a former system which authorized the Supreme Court, in such cases, to "give judgment according as the very right of the case should appear, without regarding any imperfections, omissions or defects in the proceedings in the court below, in mere matters of form" (1 *R. L.* 397, § 17), as appears by a uniform series of adjudged cases, among which are those of Brown agt. Wilde (12 *John. R.* 455); Trowbridge agt. Baker (1 *Cow. R.* 254); Stryker agt. Bergen (15 *Wend.* 490).

When power was given to the Court of Common Pleas to review the judgments of Justices' Courts, on certiorari, and on such review to give judgment in the case, "as the right of the matter might appear, without regarding technical omissions, imperfections or defects in the proceeding before the justice, which did not affect the merits" (2 *R. S.* 257, § 181); the same rule was applied to them, and the Supreme Court would reverse a judgment of the Common Pleas given in disregard of it (Noyes agt. Hewitt, 18 *Wend.* 141; Oakley agt. Van Horn, 21 *id.* 305, 307; Whitney agt. Crim, 1 *Hill*, 61; Brum agt. Tarpenny, 3 *id.* 75; McDonald agt. Edgerton, 5 *Barb. S. C. Rep.* 560). A similar power is now vested in the county courts, on appeals from the judgments of courts of justices of the peace, under that part of the 366th section of the Code of 1851, which directs the county courts in such cases, upon the hearing of the appeal, to give judgment according to the justice of the case, without regard to

technical errors and defects which do not affect the merits, and we have no doubt that its exercise by the county courts, should be governed by those prudential and salutary rules of jurisprudence which have uniformly controlled courts of record in the examination of verdicts of juries on the merits, and has so long and so steadily guided the Supreme Court and Common Pleas in affirming or reversing the judgment of Justices' Courts on the facts. To this extent, and no further, do we feel ourselves authorized to proceed in reviewing the judgments of county courts, affirming or reversing judgments of courts of justices of the peace on the merits.

The words "*of fact*," added by the Code of 1851 to the 317th section of the Code of 1848, do not increase the powers of the county courts over trials of fact in courts of justices of the peace. The term "error of fact," does not refer to any error or mistake of the jury in finding the facts; they were never the subject of a writ of error. The term *error of fact* has a distinct and well settled legal meaning. When applied to proceedings in error, in courts of record, it means such facts as affect the regularity and validity of the proceedings on the record and still do not appear on it, such as the death, infancy, or coverture of one of the parties. The record assumes or purports to be between parties legally competent to prosecute and defend the action, but still does not say so. If these assumptions are false, the proceedings are irregular. But as these errors are not committed by the court, there is no impropriety in calling upon the court to correct them; therefore writs of error for errors of fact, may be, and usually are, made returnable before the court which rendered the judgment, or in which the record is. These errors not appearing upon the face of the record are brought before the court by an assignment alleging them, which is therefore called an assignment of errors *of fact*. The defendant in error may deny the facts assigned for error which makes an issue of fact to be tried by a jury. If the facts are found for the plaintiff in error, and the court give judgment for the plaintiff, the judgment is that the erroneous judgment be *revoked*, not *reversed*, which is the language of the judgment of reversal by an appellate tribunal for errors of law. It is clear that these errors do not impeach the

judgment of the court, upon the merits, as they appear upon the record, but only show that the proceedings are not applicable to the persons sought to be charged by them. Nor have they any resemblance to those irregularities or improprieties which relate to the proceedings before the jury. For the correction of those irregularities, a special application must be made to the court, and it is a general rule that a writ of error will not lie to correct those irregularities which, by the practice of the courts, are usually corrected on a motion. But courts of justices of the peace did not possess the power to set aside verdicts rendered in their courts for misconduct committed by the jury, nor could the justice return such misconduct to a certiorari, as a part of the proceedings before *him*. The former Supreme Court, therefore, on certiorari to a Justice's Court, allowed such irregularities to be assigned as errors of fact, and as such took cognizance of them (15 *John. Rep.* 87; 1 *Cow. Rep.* 238; 4 *id.* 17). The statute of 1830, which authorized the removal of justices judgments to the Common Pleas, by certiorari, dispensed with the assignment and joinder in error, and directed the cause to be heard upon the papers filed with the clerk (2 *R. S.* 257, § 180). After this, it was supposed by a part of the profession, at least, and some of the courts, that the statute had totally abolished the use of an assignment of errors in all causes removed by certiorari from Justices' Courts. When in the year 1835 the Supreme Court decided that the statute did not apply to an assignment of errors of fact (*ex parte* H. J. Williams vs. Albany Mayor's Court, 12 *Wend.* 266).

That the above are the "*errors of fact*" alluded to by the legislature in the 366th section of the Code, is apparent from some of the subsequent provisions of that section. The legislature had repealed all former statutes providing for the review of judgments rendered by courts of justices of the peace, and declared that the only mode of reviewing such judgments, should be by appeal to the County Court, as therein prescribed. The appeal is to be taken by affidavit, which shall state the substance of the testimony and proceedings before the court below, and the grounds upon which the appeal is founded. To this affidavit the respondent may make a counter affidavit. Both of the affi-

davits are to be served on the justice, who is to make a return to the appellate court, of the testimony, proceedings and judgment. This return would bring before the County Court all the proceedings, decisions and errors of the Justice's Court, affecting the merits of the cause, or the subject matter of the action and the rights of the parties, as distinguished from those which affect the mere proceedings. And as to those irregularities which relate to the mere proceedings which were not before the justice, and which the justice could not return, the affidavit and counter affidavit would be equivalent to an assignment and joinder in error *of fact*. When the appeal is founded on these, the County Court may try it upon affidavits or on the examination of witnesses (*Code of* 1851, § 366). These provisions make out a full and complete system for the review of judgments and proceedings of courts of justices of the peace, by county courts, both as to errors of law and fact, without giving them any arbitrary or illegal control over a full and fair trial of the facts in the way pointed out by law.

But in the case under consideration, the County Court did not assume to reverse the judgment for any error of fact, in the proceedings. The county judge in his opinion clearly states the grounds upon which the judgment of the Justice's Court was reversed, which were, 1st. That the justice erred in excluding testimony offered by the defendants on the trial; and, 2d. That it appeared from the evidence that the plaintiff's pretended title to the horse in question was void as against the defendants, they being the creditors of John Adsit, under the statute relating to fraudulent conveyances, &c. (2 *R. S.* 136, § 5). To understand these points it will be necessary to recur to some of the evidence given before the justice. The plaintiff, to establish his title to the horse, gave evidence tending to prove that early in the spring of 1849, John Adsit owned two asses, a male and a female, which the witnesses called a "*Jack*" and a "*Gill*." That in June, John Adsit, being about to leave home on business, authorized Hiram Adsit to sell the animals to the plaintiff. That on the 12th of June, Hiram, as the agent of John Adsit, did sell the asses to the plaintiff for two notes for $60 each, payable to John Adsit, one in a year and the other in eighteen months, and turned the

Jack out to the plaintiff at the time. That the Jack continued in the possession of the plaintiff until taken out to be traded for the horse, and that the notes were delivered by Hiram to John in August, which was the first time he saw John after the receipt of the notes. That about the last of July, John Adsit, at the request of the plaintiff, exchanged the Jack with one Kinner for the horse in question and a cow. That the exchange was made by John in the plaintiff's name; and that John received the horse and cow for the plaintiff and as his property. That John took the horse to his father's, where he resided himself, upon an understanding with the plaintiff that he should have the horse when he wanted him. That under these circumstances John kept the horse and occasionally used him, until he brought him to the plaintiff's stable, the day before he was taken by the defendants. On testifying as a witness for the plaintiff, to the trade with Kinner for the horse and cow, John Adsit said that he traded the cow which he had of Kinner to one Worthington for another jackass, and sold the Jack to Mr. Bradley for a stove, wagon, wood and lumber, called $80. The defendant then asked the witness "what other property besides the cow, he let *Worthington* have for the Jack, which he had of him?" This question was objected to by the plaintiff, and the objection sustained by the justice; but the witness answered that he was to let Worthington have the lumber that he got for the *Gill*. This is the improper rejection of evidence which forms one of the grounds upon which the county judge reversed the judgment of the Justice's Court, and it appears to me that it is not solid enough to add much support to that judgment. The defendants did not state what they desired or expected to prove by the answer to their question. They did not show then, nor does it appear now, how any answer which could be given to the inquiry could be material to the question on trial. The answer could have no direct relevancy to the subject matter of the issue. The horse in question was not obtained from Worthington, nor did the Jack which Worthington let John have, enter into the value of the horse or have any connection with the property of the horse. If John had answered that besides the cow he let Worthington have some other property of the plaintiff, it would only

have tended to show that the plaintiff owned the Jack which was obtained from Worthington, but would not have weakened the evidence tending to show that he owned the horse in question, which was obtained from Mr. Kinner. If John had answered that besides the cow, he let Worthington have the balance in his own property, it would only have tended to show John's interest in the Jack, which he had of Worthington, but would not have shown his interest in the horse in question, nor weaken the plaintiff's title to the horse. Under such circumstances, where the relevancy of the testimony can not be seen, and where it is not clearly on a cross-examination, it is the duty of the party who offers the evidence, which is objected to, to point out some legitimate purpose for which he offers it, or the court may reject it. Besides, in this case, the witness, notwithstanding the objection, went on and answered the question, to which the defendants made no objection or further inquiry, but abandoned the subject and proceeded with the trial. Under such circumstances the defendants can not revive the subject in an appellate court.

The second ground on which the Judge of the County Court puts the judgment reversing the judgment of the Justice's Court, is, to use his own language, "That as there was not at the time of the pretended purchase of the Jack by the plaintiff, and afterwards, an actual and continued change of possession from John Adsit to the plaintiff, the purchase was therefore fraudulent and void as to creditors." The judge then refers to the 5th section of the statute, cites several adjudged cases, giving it as his opinion that a plaintiff must in a case like this, show not only a good and valuable consideration paid, or that an honest debt existed, in the payment of which the property was received, but also show facts and circumstances tending to prove an absence of an intent to defraud creditors, and that the sale was made in good faith, that the possession of the property, by the vendor, must be explained; and finally comes to the conclusion that "in this case there was not any proof tending to show good faith or the absence of fraudulent intent, and hence there was no evidence to sustain the verdict, and that the Justice's Court would have been warranted in refusing to submit the cause to the jury, and in non suiting the plaintiff.

Before adopting these conclusions of the county judge, or examining all the decisions referred to by him, it may be proper for us to inquire what was the subject to which his reasoning applied, and which constituted the burden of his second point. His honor, the county judge, says it was the fraudulent purchase of the Jack, by the plaintiff of John Adsit, which was declared by the statute to be fraudulent and void, as against his creditors, because possession was not delivered. This might have been a very important matter if the creditors of John Adsit had claimed the jackass instead of the horse; but as it is, it is not easy to perceive how the statute can be applied to the case under consideration. There was no proof or pretence that John Adsit ever sold or pretended to sell the horse to the plaintiff. Therefore there was no transaction to which the statute could be applied. The substance of the statute is that a sale of personal property, without changing the possession, shall be presumed to be fraudulent as against the creditors of *the vendor*. It considers *the sale* as a sham sale to keep *the property* from the creditors of the vendor, and void as against them. In this case the plaintiff's vendor of the horse in question, if he had one, was Kinner, and his creditors do not complain. The county judge mistook the whole nature of the defence. The defence proceeded on the supposition that the sale of the *jackass* by John Adsit to the plaintiff was a sham sale, made to keep that property from John's creditors, and that the subsequent disposition of the property by him, showed his continued ownership, and proved that the use of the plaintiff's name was only a disguise. In short, that the purchaser of the horse from Kinner, was really made with John's property, and for his benefit. This aspect of the case, if established, would have been quite as fatal to the plaintiff's action as the one now assumed; but it would present a different question from the one decided by the county judge, and one to which the statute referred to, had no application. This question was fully and fairly presented to the jury upon proof on both sides and was decided against the defendants, and the County Court had no power to interfere with that verdict, or to reverse the judgment of the Justice's Court founded on it. The judgment of the County Court must, therefore, be reversed, and that of the justice affirmed.

SUPREME COURT.

BURHANS agt. TIBBITS.

In an action for the entry upon and injuries to real property, the title was put in issue by the pleadings—and the jury found the title to the property in the defendant, but also found that the plaintiff was entitled to recover fifty cents for the conversion of certain personal property of the plaintiff, found on the premises—*Held*, that the plaintiff was *not entitled to costs* under § 304 of the Code. It was not a "*recovery*" by the plaintiff within the meaning of that section.

An order, made at special term, allowing such costs, is *appealable* to the general term as involving a part of the merits of the action.

Albany General Term, September 1852. *Present*, PARKER, WRIGHT and HARRIS, *Justices*. This was an appeal from an order of Mr. Justice WATSON, made at special term, awarding costs to plaintiff under § 304 of the Code.

The complaint alleged that the defendant entered the close of the plaintiff (describing it) and by himself and servants, &c., removed the soil &c., trod down and destroyed the grass &c., tore down, removed and converted the fences &c., dug up the orchard, garden, trees &c., dug up, disturbed and removed the soil of a public highway, and took and removed and converted to his own use the fences on the plaintiff's land, so that sheep and hogs from the highway entered upon the plaintiff's land and destroyed the grass and vegetables then and there growing. The answer admitted that the premises described in the complaint were the close of the plaintiff, except so much as was included within the bounds of the road of the Gilboa and Potters Hollow Turnpike Company. It then set up title to so much of the premises as were included within the bounds of the road as laid out and designated by law, and a justification of the entry thereon by the defendant as president of the aforesaid company, for the purpose of constructing the road. The reply took issue upon the new matter stated in the answer.

The cause was tried before Justice HARRIS, in June 1851; and on motion of the defendant it was ordered that the verdict of the

jury be entered as follows: "The jury find for the defendant on the question of title put in issue by the pleadings; and a verdict of fifty cents in favor of the plaintiff for the value of certain personal property of the plaintiff, found upon the premises by the defendant, and by him converted to his own use." At a special term held by Mr. Justice WATSON in November 1851, the plaintiff on notice of motion previously given, after argument of both parties, obtained an order, that he recover full costs in the action and ten dollars costs of the motion, to be inserted in the entry of judgment. From this order the defendant appealed.

L. TREMAIN, *for Plaintiff.*

J. MACKAY, *for Defendant.*

By the Court, WRIGHT, Justice.—This action is to be regarded as having been originally commenced in this court. Though a suit was previously instituted before a justice of the peace, and discontinued by the defendant interposing an answer that title would come in question. Such proceedings were not subsequently taken by the plaintiff as to continue the cause in this court. In determining, therefore, the rights of the parties on the appeal, we are to regard the action as one originally commenced in the Supreme Court.

If the plaintiff is entitled to full costs, it is because the statute gives them to him; and his right is in no way strengthened by the order of a judge. If the statute gives costs, he is entitled to them, as of course; if not, no order can extend to him the right. There is no discretion to be exercised by the court. The court may construe the statute, but can do nothing more.

Prior to the Code, if the plaintiff recovered judgment for any amount in an action in which the title to lands or tenements, or to a right of way, or right by prescription or otherwise, to any easement in lands, or to overflow the same, or to do any other injury thereto, was put in issue by the pleadings, or came in question on the trial of the cause, he recovered the costs of the court in which the action was brought (2 *R. S.*, 3*d ed.*, 703). Whether title came in question on the trial, was determinable by the certificate of the judge. The Code provides that "costs shall be allowed of course to the plaintiff, upon a *recovery* in an action

where a claim of title to real property arises on the pleadings, or is certified by the court to have come in question at the trial (*Code*, § 304). In this case, there was no certificate of the court, and if the plaintiff is to be allowed costs, it must be solely on the ground that on the pleadings in the action in which he has recovered, a claim of title to real property arose. To determine this, the pleadings are to be inspected, in connection with the verdict rendered. It is to be ascertained, 1st. Whether title has been put in issue by the pleadings; and 2d. Whether there has been a "*recovery*" by the plaintiff, within the meaning of the section.

The facts alleged in the complaint as constituting a cause of action, are substantially those under the late system of pleading required to be stated in an action of trespass to real property, charging the injuries to it specifically. The facts are alleged that the defendants entered the close of the plaintiff (describing the close or premises) and by himself, his servants &c., removed the soil &c., trod down and destroyed the grass, herbage &c., tore down, removed, used and converted the fences; dug up the orchard and garden, and the trees of the plaintiff; cut down, took and carried away the trees; dug up, disturbed and removed the soil of a public highway, and took and removed, and converted to his own use the fences on the plaintiff's land, lying on both sides of the highway, so that cattle, sheep and hogs, from the highway entered upon the plaintiff's land, and destroyed the grass and vegetables then and there growing. There is no count or cause of action separately stated for trespass, in taking and carrying away personal property, or in trover, for the conversion of personal property found on the premises. The answer admits that the premises described in the complaint are the close of the plaintiff, except so much as is included within the bounds of the road of the Gilboa and Potters Hollow Turnpike Company. It then sets up title to so much of the premises as are included within the bounds of the road, as laid out and designated by law, and a justification of the entry thereon by the defendant, as president of the company, for the purpose of constructing the road. The reply takes issue upon the new matter stated in the answer. There is, therefore, arising upon the pleadings, a claim of title,

not to the whole of the premises described in the complaint, but to that part embraced within the designated bounds of the turnpike road. To that extent title was put in issue by the pleadings.

On the question of title, the defendant succeeded. The jury found that title to that part of the close to which it was pleaded was not in the plaintiff, so as to enable him to maintain the action against the defendant. There was, consequently, I think, no recovery by him within the meaning of the first subdivision of the 304th section of the Code.

But it is urged that because the jury in finding the main issue for the defendant, also found a verdict of fifty cents in favor of the plaintiff for the value of certain personal property of the plaintiff, found on the premises by the defendant, and converted by him, such a *recovery* has been had by the plaintiff, as that under the section of the Code cited, he is to be allowed costs as of course. I am of a different opinion. Such a construction of the section would work a most palpable wrong. The action was for the entry upon and injury to real property, and it is for such cause, and in such an action, the recovery is to be had. To show title would be a complete defence. But can it be, where such defence is established, because the Code allows the joinder of a cause of action for the conversion of an article of personal property found on the premises, that the defendant, though succeeding so far as the claim of title is interposed, and upon that issue distinctly, is, notwithstanding, to pay full costs to the plaintiff, when the damages assessed for the conversion are under fifty dollars, and but merely nominal? Under the late practice, counts for trespass on lands and trover could not be joined, and no difficulty of this kind could have arisen. The first subdivision of § 304, under which the plaintiff claims to be allowed costs, is substantially a reenactment of subdivision two of § 3 of chap. 10, title 1, part 3d of the Revised Statutes. In the complaint in the present case, the only cause of action stated is the entry upon the lands of the plaintiff and the injuries thereto. The verdict of the jury is a singular one. They have undertaken to render a general verdict pronouncing upon the only issue in the case in favor of the defendant, and upon an issue, not made by the plead-

ings, in favor of the plaintiff. If this were allowable, or if it was effected by an amendment of the pleadings, or by conforming the pleading to the facts proved on the trial, still the question returns as to the true meaning of the section of the Code on which the plaintiff bases his claim. What did the legislature intend by it? In my judgment nothing more than to reenact an existing provision, to apply to cases to which it had heretofore been applied, and none others; to confine the allowance of course of costs to a recovery in actions solely in respect to real property, and whenever the title to such property came in question. That in such actions that could not be prosecuted in the court of a justice of the peace, and over which he had no jurisdiction, costs should be allowed, whatever the amount of the recovery might be; but that if a cause of action was or could be stated in the same complaint for the recovery of money only, in which no question of title to real property was involved, the recovery for such cause should be fifty dollars or more, to entitle the plaintiff to costs. That when the section speaks of a recovery in an action where a claim of title arises, it means that such claim of title shall arise on the entire pleadings, and that the recovery shall be in hostility to such claim. No such absurdity is intended, as to authorize a defendant to set up a complete defence, so far as the action relates to real property, and obtain the verdict of the jury in his favor, but because a recovery of fifty cents is had upon a question independent of any claim of title, that the plaintiff is to be regarded as succeeding upon the whole case so as to be allowed costs of course. We are also to construe the whole section together, and such a construction placed on the first subdivision would be in conflict with its spirit and in direct hostility to the letter and spirit of § 305 and of the 4th subdivision of § 304. I am of the opinion that the order should be reversed.

We think the order in this case was of such a nature that it was a subject of an appeal. It involved a part of the *merits* of the action. It was a matter of strict legal right as to the allowance of costs. The order did not relate to a matter of practice or procedure, or rest in the discretion of the court (8 *Barb. S. C. Rep.* 329). The court in the cases cited has construed the expression, " when it involves the merits of the action, or some

some part thereof," to mean that which relates to the strict legal rights of the parties as contradistinguished from mere questions of practice, which every court regulates for itself, and all matters which depend on the discretion or favor of the court.

Order reversed, with $10 costs

SUPREME COURT.

JUDD, Assignee &c. agt. YOUNG.

A person not a party, but having an interest, can not be made a party to an action, under § 122 of the Code, where the action is on contract, express or implied for the recovery of money. That section must be confined to actions for the recovery of "real or personal property," that is, for *specific* personal property.

Tompkins Special Term, August 1852. This is a motion, in behalf of Messrs. Kidder & Burrett, to be made parties defendants in the above action, under § 122 of the Code, on the ground that they, as subsequent mortgagees and judgment creditors, have a lien on the surplus moneys in the hands of the defendant; and which surplus arose on the sale of certain premises, by virtue of an older mortgage owned by the defendant. The plaintiff claims said money by virtue of an assignment from the mortgagor for the benefit of creditors. The plaintiff resists the application on the ground, amongst others, that the clause under which the applicants claim to be made defendants, does not include a case like this, where the action is to recover a sum of money on an implied assumpsit, or contract.

JOHN M. BRADFORD, *for the Motion*

C. G. JUDD, *Opposed.*

SHANKLAND, Justice.—The words of the Code are, "And when in an action for the *recovery of real or personal property*, a person not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a

party, it may order him to be brought in, by the proper amendment." The question is, whether the statute extends to actions on express and implied contracts for the recovery of money? I have come to the conclusion that it does not, but must be confined to actions for the recovery of specific real and personal property. I am led to this conclusion by comparing the clause above cited with the subsequent clauses in the same section, where the defendant is authorized to make a motion to substitute other persons as defendants in his stead. There the word *contract* is used in addition to the term *real* or *personal property*. The word *debt* is also used; thus evincing a design to allow of *substitution* of defendants in a class of actions wherein *additional* defendants can not be made.

The following sections of the Code confirm this definition of the meaning of the clause, under consideration, as being limited to actions for the recovery of specific personal property, and as not extending to actions on contract for the recovery of money, viz: § 123 subdivision 4; § 167 sub. 6; § 179 sub. 3, 5; § 206.

I have not deemed it proper to examine any of the other objections to the motion, but deny it on this ground solely, with ten dollars costs to be collected from the moving parties.

SUPREME COURT.

PEOPLE ex rel. HOUSTON agt. MAYOR OF THE CITY OF NEW YORK.

The ordinances of the common council of New York city are not *public acts* in such sense that they can be noticed without being specially pleaded.

In an alternative mandamus the relator must set forth the *facts* on which he claims a right to relief.

The state laws in relation to the licensing of butchers, victualers, hackmen, stage drivers, &c. in the city of New York are branches of the law for the good government of the city, not parts of a revenue system. The right to license is a power to be exercised by the mayor according to his judgment; he violates, in refusing it, no *right* of an applicant, though the latter have complied with every condition of the statute.

The same result arrived at, on a review of the city ordinances on the same subject.

New York Special Term, March 1851. *Alternative Mandamus to the Mayor of the city of New York.* The writ shows that George Houston, the relator, is a citizen of the United States, a free citizen of this state, a freeman of the city of New York, over twenty-one years of age, and that he has for about five years been a driver of omnibuses in that city, and was licensed in 1849 as a stage driver, which license being about to expire, he applied to the defendant in February 1851, for another license, and tendered the legal fees; and that the mayor refused to grant the license. The defendant now moves to quash the mandamus.

MITCHELL, Justice.—It was properly admitted in the argument that the ordinances of the common council are not public acts; at least in such sense, that they can be noticed without being specially set forth in pleading. The mandamus in this case sets forth no ordinance, so that the rights of the relator depend, so far as any thing before the court shows, on the laws of the state only, and not on the ordinances of the city.

The case of the Commercial Bank of Albany vs. The Canal Commissioners (10 *Wend.* 25), shows clearly that in an alternative mandamus the relator must set forth the *facts* on which he claims a right to the relief sought, or the writ may be quashed (see p. 30, &c.).

This writ merely shows that the relator is a native citizen of the United States, a free citizen of this state, a freeman of the city, over twenty-one years of age, and that he has for about five years been a driver of omnibuses in the city, and was licensed on 19th October 1849, as a stage driver, by the mayor of the city, and paid the fee for his license, which expired in July last; that on 5th February last, he applied to the defendant for another license as a stage driver and tendered the legal fees, and that the mayor refused to grant the license.

The statutes referred to on the argument were those contained in 2 *R. L.* 1813, *p.* 446 § 272, *Laws of* 1833, *p.* 13, *and Laws of* 1846, *p.* 408.

The act of 1813 empowers the common council to make ordinances to regulate hackney coaches, and the owners and *drivers* thereof and their rates of fare, and requiring them to have a *license* from the mayor, and to pay therefor a sum not exceeding $5. The same section empowers the common council to pass ordinances and regulate or *prohibit* the sale of any article on Sunday; to *suppress* houses of gaming; to regulate the butchers and to *prohibit* them from carrying on their business at any other places than such as may be designated by the common council, and to *prohibit* any but *licensed* butchers from carrying on the business of butchers.

These regulations are all intended as part of a scheme for the good government of the city, and for the preservation of the public morals; they are none of them made for the sake of raising a revenue by a tax on licenses, nor merely to confer privileges on particular classes. The butchers and the hackmen and their drivers are to be licensed that they may the more effectually be under the control of the city authorities; certain other occupations for the sake of the public good are to be suppressed.

The act of 1833, pages 13, 14, § 20, 21, gave power to the common council to pass ordinances for regulating and *licensing* the keepers of ordinaries and victualing houses; and where fruits &c. might be sold, "and for the more effectual suppression of vice and immorality, and the *preserving of peace and good order* in said city;" and for *licensing* and otherwise regulating the use *of dirt* carts, and to prevent or regulate the use of fire-

arms &c.; and made the offenders against such ordinances guilty of a misdemeanor and subject to a fine of $10.

The act of 1846, page 408, § 10, made the two sections last quoted from the act of 1833 applicable to cartmen, cabmen, hackney coachmen, *drivers* of *stages* and *omnibuses*, and to the vehicles driven by them, and to public porters and hand cartmen. These acts also are evidently branches of the law for the good government of the city, and not parts of a revenue system.

The license, therefore, is required not as a means of collecting a tax, but as a means of enforcing good order. While there are many ordinaries and victualing houses, conducted with the most perfect propriety, the legislature apprehended, probably, that others would hold out a sign of those businesses as a means of entrapping the stranger and of concealing some unlawful occupation. They also probably considered that the lives of passengers in omnibuses would be endangered if unskillful or disorderly drivers were employed; that the lives of foot passengers would also be in danger, and that collisions would be likely to occur among the numerous vehicles that crowd our streets; that strangers also might be imposed on and misled.

All these are matters which would induce the legislature to limit the occupation of drivers of public conveyances to those only who should be approved by the licensing power. If the mayor, therefore, has the right to license, it must be a power to be exercised according to his judgment of what is proper, and that judgment he exercises when he refuses to give the license. He may refuse because in his opinion there may already be too many drivers licensed, or because the applicant may not be a suitable person, and he is not bound to assign reasons for his decision. If he abuses his power he may be impeached.

This is not a question whether the relator shall be allowed to labor or not, as it was argued to be, but whether he shall be allowed to labor in a special business to which the licensed or privileged alone are admitted. If no license is needed, to follow the business, and it is open to all, then (as was conceded) there is no need of a mandamus.

These public acts, therefore, do not show that the granting of a license to such a person as the relator, is a matter of right in

him, nor that the mayor is the person who shall grant them. The mandamus, therefore, is bad on its face.

The counsel, however, on both sides argued as to the effect of the ordinances, as if they were inserted in the mandamus by proper amendments. These are the Ordinances of 1839, chapter 59, pages 311, 312, 313; Revised Ordinances of 1845, pages 470, 472, 473, § 8, 9, 10, 11; and volume 16 Proceedings of Boards of Aldermen and Assistants, passed May 1848.

Under these ordinances the mayor is authorized and required to issue licenses, and *to revoke the same at his pleasure*, to as many persons *as he may think* proper to keep and *use* stage coaches, &c.; and no person is to keep or *drive* any such stage coach, &c. without being *licensed* as aforesaid under the penalty of $50; and no person is to *drive* any such stage unless he be twenty-one years of age, and have obtained *a license* from the mayor, under a penalty of $10 for every such offence; and the mayor is *authorized* to grant licenses to *drivers* of such coaches, &c., as often *as may be necessary*, and to suspend and revoke the same, whenever he *may deem it expedient*.

Thus the mayor is expressly authorized to revoke or suspend licenses to drivers whenever *he* may *deem* it expedient, and grant them as often as may be necessary. Some one must judge as to when they are necessary, and as he is to grant them, he alone must judge as to the propriety of granting them; and he alone is expressly authorized to revoke them. If one has power to license, and then when he deems it expedient to *revoke* the license, the absolute control as to the revocation seems almost necessarily to make him the sole judge of the propriety of licensing; for if he could immediately revoke on granting the license, it would be idle to grant it. A license from its nature also implies the idea of favor to a preferred party, and not of a thing which he could originally obtain as a right. Thus innkeepers and keepers of taverns and groceries are licensed to sell liquors; yet it is believed that no one has as yet maintained that any one who demands a license and tenders the legal fees can obtain one for any of those employments (see 1 *R. S.* 678). When the legislature means that every applicant should have a license they say so; thus in the case of peddlers of foreign goods it is made ex-

pressly the duty of the proper officer to grant the license to every such applicant (1 *R. S.* 575, § 1 to 4). But no such duty is imposed on the mayor; on the contrary, he is made the judge of the propriety of granting, refusing or revoking a license, and with that judgment or discretion, as it may be called, the courts can not interfere. If our laws were that no man should follow any business whatever without a license, and paying for it, then it might well be argued that the license was required only for the sake of the tax, and that on payment of the tax the license should be granted. But if such were the general law and there were such special laws as exist in the case, the intention would still be clear that in this class of cases the licensing power was discretionary.

The motion to quash the alternative mandamus is granted, with $10 costs of the motion; but to enable the relator to carry this case up to a higher court, leave is given to him to amend the writ by inserting the ordinances referred to, and any others which he may deem relevant, and making up a record containing the writ so amended, a return to be filed by the defendant declaring that he deemed it inexpedient to grant the license prayed for, and a demurrer and joinder in demurrer. The relator will give notice in writing in ten days after service of notice of the order, whether he elects to make up such record.

SUPREME COURT.

Dresser agt. Shufeldt.

A creditor may impeach the discharge of a debtor, obtained under the insolvent laws, for fraud; but he can not disregard it and issue execution on his judgment, and sustain the execution and levy by affidavits of the fraud.

The court will not try the question of fraud on motion, but will set aside such an execution and leave the plaintiff to his action on the judgment; and will not allow the levy to be retained as security.

New York Special Term, 1852. The plaintiff obtained judgment for $148·68 in May 1845, against the defendant, and issued

execution thereon. Since then no other execution was issued until the 27th of May last. In the mean time the defendant had obtained a discharge from his debts under our insolvent law. The last execution was issued without any application to the court, and is now attempted to be sustained on the alleged ground that the discharge was fraudulently obtained. The execution was stayed on the defendant giving a bond with sureties conditioned to pay such sum as may be recovered by the plaintiff in any action he may be permitted to bring by order of this court.

MITCHELL, Justice.—On the question whether an execution can be issued under § 458 of the Code, without leave of the court, after five years from the rendering of the judgment, provided an execution had been issued and returned within that time, MASON, J. decided in the affirmative in 4 *How. Pr. R.* 257, Pierce vs. Crane; a different opinion seems to be expressed by HARRIS, J. (*id.* 101-2), in the Catskill Bank agt. Sanford. I am willing to leave that still an open question.

In 1 *How. Pr. R.* 181, Bangs vs. Strong, a motion was made to set aside an execution on a judgment recovered in 1838, on the ground that the defendant had been discharged under the bankrupt law; the motion was opposed, as here, on the ground that the discharge was obtained by fraud.

Judge JEWETT admitted that the court ought not to try the validity of the discharge on affidavits, but thought that justice required that the plaintiff should not lose a lien acquired by levy without an opportunity to try the validity of the discharge; and granted the motion to discharge the execution unless the plaintiff should bring an action on the judgment within sixty days; and ordered the execution and levy should stand as security for the final result of the suit.

In 9 *Wend.* 431, Russell vs. Packard, the defendant being arrested on a *ca. sa.* moved to set it aside on the ground of his having obtained an insolvent discharge. The court (Sutherland, J.) discharged him from his arrest and left the plaintiff to his action on the judgment.

In 1 *Cowen*, 165, Baker vs. Taylor, the defendant having obtained his discharge after verdict and before judgment, was dis-

charged from a *ca. sa.* on motion. The court intimated that if fraud was alleged the court would *open the cause* so far as to give the plaintiff a chance to try that question, leaving the judgment (but not the *ca. sa.*) to stand as security.

In 1 *Cowen*, 50, Reed vs. Gordon, the defendant was discharged under the insolvent law; afterwards he was held to bail on a debt contracted before his discharge, the plaintiff alleging that the discharge was obtained by fraud, and that the judge granting it had no jurisdiction.

The court say, "we never can try either fraud or irregularity upon affidavits. We find this settled by repeated decisions, which were referred to upon the argument," and the defendant was discharged on common bail. In a note to page 51, the learned reporter says: "The difference between the practice of the English courts arises from the *conclusiveness* of our discharge as *evidence* (1 *R. L.* 464), which the English legislature have not extended to their insolvent laws." Our United States bankrupt law, § 4, was similar to (though not the same as) our state law in this respect.

In 20 *John. R.* 21, Taylor vs. Williams, the court noticed that in applications for an insolvent discharge the creditors have *their day to investigate and oppose* at the hearing before the judge. That if the specification of the debt is such as to apprise creditors of its general grounds, it would be sufficient; "and that it might lead to fraud on the part of creditors, if they were permitted to lie by and not oppose the discharge, and then, *after the debtor has acquired new credit*, to fall upon him and *strip him of property* with *which new creditors may have intrusted him.*"

These remarks equally apply to this case; the property here may have been acquired on credit, and that founded on the discharge thus obtained, and perhaps not opposed by the old creditors.

In 9 *John. Rep.* 259, Noble vs. Johnson, the defendant was in custody, having been surrendered by his bail and moved for his discharge, having since obtained a certificate of discharge under the insolvent law. Fraud was alleged by the plaintiff. The discharge was granted, the court saying: "We will not try the validity of a discharge under the insolvent act by affidavits.

It was so decided on several similar applications at the las term. *The plaintiff must resort to his action.*"

Thus the court uniformly in all cases that came before it, until the case of Bangs agt. Strong, recognized the conclusiveness of the discharge, where a motion was made before them, and compelled the plaintiff to resort to his action if he intended to dispute it on the ground of fraud.

It is right that it should be so; the plaintiff has had his opportunity to oppose the discharge on the ground of fraud. If he attempted to oppose it on that ground and failed, it is strong evidence that his charges are unfounded; if he made no opposition the evidence is equally strong. He has had his day in court to establish that very point—a judgment has been passed upon it which the statute declares "shall be conclusive evidence of the proceedings and facts therein stated" (2 *R. S.* 38, § 19, and *id.* 21, § 25).

The court expressly says it will not try the question of fraud on affidavits, and if they do not try it, then the discharge remains as conclusive evidence of its validity until impeached in the way prescribed by the court, namely, by action. How it can be conclusive evidence of its own validity and yet be disregarded and an execution be allowed to be issued and levied and retained, while the court has no proof of the fraud, I can not comprehend. The court must either take the proofs on affidavits and decide accordingly, or set aside the execution and leave the plaintiff to his action, or it will give no effect to a record which the law declares to be conclusive evidence; and which is conclusive until effectually impeached. To allow the execution to go, and to refuse to try the question of fraud, is to make the mere charge of fraud more potent on the *motion* than the conclusive record.

It is true the creditor may impeach the discharge for fraud, and if he succeeds it will be void (2 *R. S.* 23, § 35). But if the court will not, on motion, hear the proofs of fraud or innocence, it must treat the discharge as valid. There can be no difference in principle (as Justice Jewett supposed) between a motion to set aside a *ca. sa.* and a motion to set aside a *fi. fa.* If the defendant is honest, and has acquired property since his discharge,

or been trusted with it, he is as much entitled to use it, as he is to the freedom of his person. The discharge is equally effectual to his goods as to his person, and if contaminated by fraud equally inoperative over each.

The revisers seem not to have approved the practice of discharging a defendant from *mesne process* merely because he had obtained an insolvent discharge, but required notice to be given to the plaintiff before he should be so discharged; but then they also required the question of fraud to be passed upon by the officer to whom the application for such discharge should be made (2 *R. S.* 38, § 21, 22); and they did not extend the requirement of notice to cases of executions, but left them to stand as before (2 *R. S.* 23, § 34), and the sheriff could discharge one in prison on the mere production of the discharge (*id.*).

Why should the judgment creditor have an advantage over all other creditors? they can not reach the defendant's property until they establish the fraud; why should he? To give him the preference holds out a temptation to attach such property as this—a vessel just going to sea—and hold it until in a regular course of litigation it shall be decided whether the defendant has been guilty of fraud or not; in the mean time the property being consumed by its own nature and the costs of keeping it. A defendant might better pay the debt, than submit to such a delay; and creditors knowing this would speculate on his fears and issue execution with little or no foundation for their suspicions. I am satisfied that "reason and equity," appealed to by Judge Jewett, require the courts to pass on the question of fraud on the motion, or (as the law was before uniformly established) set aside the execution and leave the plaintiff to his action on the judgment.

I would still readily adopt the decision of Justice Jewett if I could, on some principle, reconcile it with the uniform course of former decisions, but I can not.

It is against principle to allow a matter which ought be put in issue and tried by a jury, and which lies at the foundation of the plaintiff's cause of action, and without establishing which he can not succeed in his suit to be assumed by him, and to permit him without proving it or alleging it, to get at once the fruit of a verdict and judgment on the issue, by issuing an execution,

which is irregular if the matters to be affirmatively proved by him are not true.

In my opinion the execution was irregularly issued, and should be set aside; the defendant stipulating not to commence any action on account of the execution, and the plaintiff should be left to his action on the judgment.

SUPREME COURT.

TRAVIS AND OTHERS agt. TOBIAS, MCGREGOR AND REYNOLDS.

In actions where the defendant is not held to bail, several persons may be named in the summons, and the plaintiff may deliver a complaint against only the one upon whom the process is served, omitting the names of the other defendants, mentioned in the summons.

In an action arising on contract for the recovery of money, where the complaint seeks to vacate an agreement extending the time of payment, for fraud, and to obtain an immediate judgment for the whole demand, the plaintiff should insert in the summons, according to the 2d subdivision of § 129, *that if the defendant fails to answer, &c., the plaintiff will apply to the court for the relief demanded by the complaint.*

Washington Special Term, February 1851. In November 1850, the plaintiffs issued a summons in this action, and stated therein that if *the defendants failed to answer the complaint, the plaintiffs would apply to the court for the relief demanded in the complaint*, being the clause required by the 2d subdivision of § 129 of the Code. The plaintiffs also applied to the county judge of Washington county and obtained on the 13th November 1850, an attachment under § 227 of the Code, against the defendants as non residents of this state. On the 23d November, the summons and attachment were served on the defendant Tobias, at Whitehall in Washington county, personally. No process has been served upon either of the other defendants, nor was any property taken on the attachment. It was served by giving a copy of the summons to the defendant Tobias. On the 3d February the plaintiffs' attorney served a copy of the complaint on the

attorney of Tobias. The complaint was against Tobias alone, on a contract for the purchase of a vessel sold and delivered by the plaintiff to the said Tobias in 1848, for the sum of twelve hundred dollars. The complaint alleges that the sale was on a credit; one third of the purchase money to be paid in one year, one third in two years, and one third in three years; the said payments to be secured by the promissory notes of the defendant, together with McGregor and Reynolds as sureties. It alleges that the vessel was delivered to the defendant Tobias, and he delivered to the plaintiffs three promissory notes payable according to the terms of the contract, and purporting to be signed by McGregor and Reynolds, but that in fact neither note was signed by *the* McGregor and Reynolds agreed upon, but by other persons of the same name, who were worthless and irresponsible men. It also alleges that the notes were forgeries, and it charges that the defendant Tobias is liable to pay for the said vessel immediately, the whole purchase money with interest.

The defendant Tobias, now moves to set aside the summons, and that the defendants have judgment dismissing the complaint, with costs of the motion, and the defendants' costs in the action, on the ground that the notice contained in the summons should have been under the 1st subdivision of § 129, instead of the 2d subdivision; and on the ground that the parties have been improperly changed, and on the ground of the neglect of the plaintiff to serve a complaint against *all* the defendants, and for other or further order, &c.

O. F. Davis, for the motion, cites *Code*, § 129, 227; Russell agt. Spear, 5 *How. Pr. R.* 142; 4 *id.* 306; *Code*, § 274.

Mr. Potter, *Contra.*

Willard, Justice.—1. The first objection is that the summons is against three persons, and the complaint against one alone. Under the former practice where the writ did not require special bail, several persons might be named as defendants, and the plaintiff might declare and proceed against any one of them separately (Roosevelt vs. Soulden, 16 *J. R.* 44; Montgomery vs. Hasbrouck, 3 *id.* 538). Such was also the English practice (4 *T. R.* 696, 697; 5 *id.* 722). But in bailable actions when the

defendant was held to bail, the plaintiff was bound to pursue the process in his declaration, and if he failed to do so the court would set aside the proceedings for irregularity (Rogers vs. Rogers, 4 *J. R.* 485); and even in such actions, although the defendant was not held to bail, the proceedings would be set aside if the declaration departed from the writ with respect to the number of the defendants (Bell vs. Carroll 1 *Cow.* 193; *En. Pr.* 601, 3*d ed.*).

There is nothing in the Code which prevents the application of these principles to an action commenced by summons. It is not perceived how the defendant on whom the summons is served, can be prejudiced by the plaintiff's failing to proceed against the other defendants named in it. I think the plaintiffs are regular in delivering a complaint against the defendant on whom the process was served, omitting the names of the other defendants mentioned in the summons. This is a different question from that decided in Russell agt. Spear (5 *How. Pr. R.* 142).

2. The defendant Tobias, has no right to ask the court to dismiss the complaint, with costs in favor of the other defendants, under § 274. It is for those defendants to make the motion and not for Tobias. Those defendants have not appeared and are non residents of the state. Whether the plaintiffs will proceed against them or not, can not affect Tobias. Indeed, it appears by the plaintiffs' affidavit that they have no intention of proceeding against them. It will be time enough to decide the question when *they* invoke the aid of the court.

3. The action being on a contract for the recovery of money only, it is urged that the notice in the summons should have been under the 1st subdivision of § 129, that the plaintiffs would take *judgment for a specified sum*, rather than under the 2d subdivision, that they would apply *to the court for the relief demanded in the complaint.* The defendant has an interest in this question; for if the judgment may be obtained without application to the court, under the first subdivision, the plaintiffs' costs are only seven dollars; whereas they are twelve dollars, if judgment can only be taken on application to the court. In other respects the latter alternative is more favorable to the defendant than the former, since it gives him a longer time and will insure a closer

scrutiny of the claim against him. If the form of the summons is not conclusive on the clerk as to the amount of costs, as I think it is not, the defendants can not be in truth prejudiced by the substitution of the latter clause for the former, in the summons. Nevertheless it is desirable that the forms given in the Code should be followed, whether a departure from them be injurious or not.

There was color in this case for supposing that an application to the court for judgment would be necessary, in case the defendants failed to answer. The contract actually made between the parties had not expired when the suit was commenced, and had two years more to run. It was only by annulling that contract for fraud, that the plaintiff could be entitled to an immediate judgment for the value of the sloop. I incline to think they might have disregarded the contract and declared for the value of the sloop under a count for goods sold, or declared specially as they have, on the special agreement, stating the breach to be the fraudulent non-fulfillment of the contract with respect to procuring the security. In such case the damages are not limited to the contract price of the vessel and interest, but may exceed it. The amended complaint is so drawn, and I think the case will warrant that mode of declaring; and if so, the summons is right. But if the summons was wrong it might be amended, according to Walker agt. Hubbard, 4 *How. Pr. Rep.* 154; (*Code*, § 173, 176).

4. It has been urged on the argument that the warrant of attachment should be set aside. The attachment was issued against three defendants and the complaint is against one only.

The action was commenced by the service of the summons on Tobias (*Code*, § 127). Whether the warrant of attachment be sustained or set aside, can not affect the regularity of the action. It has not been levied on any property. I think it may, in this case, be treated as abandoned by the plaintiffs as to all the defendants but Tobias. They have proceeded upon the personal service of the summons upon Tobias, and against him alone. The notice of motion does not ask to set aside the warrant of attachment. The court may, however, set it aside under the prayer for other relief. But in each case it should be set aside without costs.

On the whole, I think the warrant of attachment should be set aside, except as to Tobias, and the remainder of the motion on the part of the defendant be denied.

The warrant is to remain in force as against Tobias.

SUPREME COURT.

THE COMMISSIONERS OF HIGHWAYS OF THE TOWN OF SCHROEPPELL agt. THE OSWEGO AND SYRACUSE PLANK ROAD COMPANY.

By the terms of the Plank Road act, as amended in 1851, in relation to the location of toll gates, it requires, of this court, judgment of affirmance or reversal of an order appealed from the County Court. But it is within the province of the court to review the report and to order a *rehearing* before the referees, when there may have been any irregularity in their proceedings or in the admission of evidence.

The evidence to be adduced before the referees must be pertinent and adapted to the nature of the proceeding. The statements of officers of the company *when not acting as agents*, are inadmissible (2 *R. S.* 40, § 80 and 81).

In order to remove a toll gate, the principal point to be established is, that the *public interest is prejudiced* in its present location.

Oswego Circuit and Special Term, June 1852. This was an appeal from an order of the county judge of the county of Oswego, directing the removal of toll gate No. 4, on the Oswego and Syracuse Plank Road, under the provisions of § 37 of chapter 210, *Laws of* 1847. The appeal was referred to three referees pursuant to § 1 of chapter 487, *Laws of* 1851. The referees reported that the location of the toll gate was unjust to the people residing upon a road known as the Telegraph road, and roads diverging from it. On the trial before the referees, evidence was admitted of the statements of some of the officers of the Plank Road Company, when not acting as the agents of the company, that the location of the gate was not a proper one. These statements were objected to by the counsel for the defendant. Application was made at this time for judgment on the report of the referees, and at the same time a motion was made on behalf of the defendants for a rehearing.

M. B. CHURCH, *for the Commissioners.*

R. H. TYLER, *for the Company.*

HUBBARD, Justice.—The act of 1851, amending the general plank road law, passed May 7, 1847, does not in terms authorize a recommitment of the report of the referees; in terms it requires judgment of affirmance or reversal of the order appealed from. But I think it within the province of the court to review the report and to order a rehearing before the referees, when there may have been any irregularity in their proceedings or in the admission of evidence; otherwise great injustice might result. This case would furnish an illustration. Here, evidence clearly inadmissible was given, and without it the proof is insufficient to sustain the report, and if, for that reason, the order appealed from should be reversed, great injustice might follow. I shall, therefore, send the case back to the referees upon the ground that the evidence of the statements of the officers of the plank road company was inadmissible.

The statute has regulated the admission of the statements of the officers of aggregate corporations, and limited them to the occasion of transacting the business of the company to which the statements relate (2 *R. S.* 40, §80 and 81). The second section of the act of 1851 (*Sess. Laws of* 1851, *p.* 919), provides that the proceedings before the referees shall be conducted the same as trials before referees in civil actions, so that the proofs adduced must be such as would be admissible before a judicial tribunal. The evidence must be pertinent and adapted to the nature of the proceeding. What amount or strength of proof shall be sufficient to establish the fact that the gate in its location is detrimental to the public interest, can not well be defined. But the pertinency of the proof is not a source of much difficulty. The precise point to be established, and which alone justifies the removal of a toll gate is, that the *public interest* is prejudiced; and this must depend upon the question of the payment of toll. The company is authorized to erect gates and charge certain toll. Now if no more toll is required or exacted, than the law authorizes for the distance actually traveled, clearly *no complaint can be made.* It is not important whether trade or travel has been

diverted from its wonted channel; such an objection strikes at the root of the principle of plank roads. Where, however, a gate is located *arbitrarily* for the purpose of exacting exorbitant toll from persons living upon a diverging road, who travel but a short distance upon the road of the company, *that* forms a good ground of complaint.

In this case it seems that the referees have found the location of the gate in dispute to be unjust in respect to the people living on the Telegraph road, and the roads diverging from it, but it is to be observed that this may be true for aught now appears, and still the *public interest*, in its largest sense, not prejudiced. It may be that the removal of the location would be equally or more prejudicial to persons residing on other roads. What I venture to say is, that the referees should not confine their inquiries to the people living on any particular road, but should look to the *general interest* of the public, and see whether on the whole, that interest would be promoted by the change—keeping in view all the time that the plank road company are authorized to select their own location, provided no more than legal toll is exacted.

It will be impossible from the nature of things, for the company to locate their gate, so that every person shall be required to pay only in proportion to the distance actually traveled, but they should endeavor to approximate to it, and if the company unreasonably or unnecessarily depart from this principle of general equality of toll, as to neighboring residents, proceedings of removal may be instituted. I think the referees in all these cases should find specifically upon the question, whether the *public interest* demands the removal of the gate, and that with reference to the payment or exaction of toll generally.

The report must be recommitted to the referees and they will proceed *de novo* to the hearing of the appeal; all questions of costs are reserved until the final hearing for judgment.

Ordered accordingly.

SUPREME COURT.

GOULD AND OTHERS agt. CARPENTER AND OTHERS.

The application for judgment on account of the frivolousness of the answer, is not a *trial;* it is more analagous to the application for the relief demanded in the complaint for want of an answer.

The plaintiff, in the former case, is only entitled, under the 307th section of the Code, to the twelve dollars costs mentioned in the first subdivision of that section.

Whether in a case where it would not have been necessary to apply to the court, had there been no answer, the costs of the application on a frivolous answer should be $7 or $12, *quere?*

The plaintiff may also be allowed the *costs of a motion*, whether the application is made to a judge out of court or in court.

It seems that if the application fails, the party whose pleading is sustained, will be entitled to the costs of defending it.

At Chambers, May 1851. This was a motion under the 247th section of the Code, for judgment, on the ground that the defendants' answer was frivolous.

O. ALLEN, *for Plaintiffs.*

H. C. VAN VORST, *for Defendants.*

HARRIS, Justice.—Upon the hearing of this case I was satisfied that the allegations in the answer did not constitute a defence to the action, and that, therefore, the plaintiffs were entitled to judgment. I was also inclined to think that this was a proper case to allow the defendants to amend, upon terms. What those terms should be, was the only question for the consideration of which the decision was reserved.

The plaintiffs' counsel insists that the hearing of the case, upon his application for judgment, is to be regarded as *a trial*, and that, therefore, if the defendants are now allowed to amend, it should only be upon the payment of such costs as the Code allows to the prevailing party *after trial.* On the other hand, the defendants' counsel insists that the hearing is to be regarded rather as the argument of a motion, and that the only costs to be

imposed as a condition of the amendment, should be the ordinary costs of a motion.

Is the application for judgment under the 247th section of the Code, on the ground that the answer is frivolous, a trial within the meaning of the term as defined in the Code? The 252d section defines a trial to be "a judicial examination of the issues between the parties, whether they be issues of law or of fact." It is not pretended that the case presents for determination any issue of fact. No material allegation in the complaint is controverted by the answer, nor has there been a reply to the answer. Nor do I think it can be regarded as an issue of law. Such issue, according to the definition given by the 249th section of the Code, can only arise upon demurrer. The decision upon this application is not, therefore, to be regarded as a judicial determination of any issue between the parties. Of course, it follows that no trial of such issues has been had.

I regard the application as more analagous to the application for the relief demanded, under the *second* subdivision of the 246th section of the Code. The plaintiffs say, in effect, that they have received no such pleading as the Code declares to constitute an answer; that although they have been served with a paper purporting to be the defendants' answer to their complaint; yet, in truth, this paper neither controverts any allegation in the complaint, nor states any new matter constituting a defence, and they, therefore, ask for judgment, as though no attempt had been made to answer the complaint. The effect of granting the plaintiffs' application is, to declare that which purports to be an answer, to be in fact, no answer, and to declare the plaintiffs entitled to the same judgment as they would have had, if no such answer had been interposed.

I am inclined to think that upon the recovery of judgment in a case like this, the plaintiffs are only entitled, under the 307th section of the Code, to the twelve dollars costs mentioned in the first subdivision of the section. Whether in a case where it would not have been necessary to apply to the court, had there been no answer, the costs should be seven dollars or twelve dollars, is not very clear. As "judgment can only be taken on application to the court," after a frivolous answer has been put in,

perhaps the plaintiff in every such case should be entitled to the sum prescribed as the allowance when such application is necessary.

I think, too, that whether the application is made to a judge out of court or in court, the plaintiff may be allowed the costs of a motion. The application is, I think, to be regarded as a motion. It is, in effect, a motion to get rid of a frivolous answer—a pleading which is not the subject of a triable issue—so that the party may have the judgment to which, but for such frivolous answer, he would have been entitled. It is true that costs on the motion are only allowable "in the discretion of the court" (*Code*, § 315). But I think that when the application is made to a judge out of court to be relieved from a frivolous answer, such judge, for all the purposes connected with such application, is to be deemed as possessing the powers of a court. He may, therefore, award costs to the prevailing party, in his discretion, within the limits prescribed by law. If the pleading is adjudged frivolous, the party seeking to be relieved from it will, ordinarily, be entitled to the costs of the application. If the application fails, the party whose pleading, though attacked, has been sustained, will be entitled to the costs of defending it.

In this case, the plaintiffs are entitled to judgment on the ground of the frivolousness of the answer. They are also entitled to $10 for the costs of this application. But the defendants are to be at liberty to amend their answer within twenty days after service of a copy of the order made upon this decision, upon the payment of $10 for the costs of this application.

SUPREME COURT.

MATTER OF MAX LOWENSTEIN.

A. obtains judgment against three partners, J. K. and L., by service of process on K. alone, who allows judgment to be taken for a few dollars less than the amount claimed.

Held, that the defendants not served, could not be proceeded against by warrant, under the non-imprisonment act, founded upon such judgment, even though they were shown to be in possession of partnership property which they refuse to apply to the payment of the judgment.

It is not, properly speaking, a judgment against the party not served, but, as to him, only against his interest in the joint property—against the *property* not the *person*.

It is against the policy of the law to allow one member of a firm, by assignment or otherwise, to give a preference to creditors against the wishes of the other members of the firm.

HABEAS CORPUS.

At Chambers, October 1851. In July 1851, M. & L. Lippman filed their complaint against E. Kantorwich, J. Jorlson and M. Lowenstein, claiming $415·12, as due by them on a joint indebtedness to the plaintiffs. Kantorwich, on 31st July, admitted service of the summons, and offered to allow judgment to be taken pursuant to § 385 of the Code, for $410 and costs, and waived notice of adjustment of costs. On 1st August the plaintiffs filed notice of their acceptance of the offer and entered judgment against all three of the defendants for the $410 and costs. On the same day Kantorwich made affidavit that Lowenstein was his partner and had received $2000 cash for the firm, and $1600 in goods, which he converted into cash or notes, and still held. On the 11th day of August the plaintiffs applied for and obtained a Stilwell warrant against Lowenstein alone, alleging that he was indebted to them on a judgment on contract against him and the other defendants; that they requested him to apply the funds of the firm in his hands, mentioned in K's affidavit, to the payment of the judgment, but that he refused to do so. Lowenstein denied that he had property of the firm, or that he refused to apply it to the payment of the judgment, or that he owed the

plaintiffs any thing, or that the judgment was against him; and also denied the specific charges made by Kantorwich.

A habeas corpus was issued on behalf of Lowenstein, and the same issues were joined on it. The judgment was proved in the form above stated, and the parties were at issue as to the facts:

1. Whether Lowenstein was a partner; and
2. Whether he had partnership property;
3. Whether he refused to pay as alleged.

And on the point of law, whether such a warrant could issue against Lowenstein, on such a judgment, even if he was a partner and the other facts were found against him.

The evidence showed that Lowenstein was a partner as early as January last and that he received property of the firm and refused to apply it to the payment of this judgment. This left only the question of law to be passed upon.

MITCHELL, Justice.—The provisions of the law allowing judgment against joint debtors when process was served on only one of them, have varied from time to time, and as they varied, their effect has been varied under the decisions of the court. Under the revised laws of 1813 (1 *R. L. of* 1813, *p.* 521, § 13), it was enacted that *all* the defendants should be answerable *separately* for the debts; and the plaintiff should have judgment and execution against *all* " in the *same manner* as if they had all been taken and brought into court," but *execution* was not to issue against the body or separate property of those not served.

Under this act it was held that the judgment was *prima facie* evidence of the liability of the defendant not taken, and of the extent of his liability—but that he could, by special pleading, show that he was not such joint debtor.

The Revised Statutes altered the law, omitting the provision that all the defendants should be answerable separately for the debt, and declaring that the judgment should be evidence against the defendant not served, " only of the extent of the plaintiff's demand *after* the liability of such defendant should have been established by other evidence " (2 *R. S.* 377, § 1, 2), &c.

Under the statute it was held by two of the judges that the defendant not taken might be sued on the judgment, and that he might show on the plea of *nul tiel record* that he was not a joint

contractor. The point actually decided, however, was only that on such plea he might make that defence, and that the judgment alone was not *prima facie* evidence against him. It was not necessary to decide whether the action could be sustained or not, and all that was said on that subject might be deemed as merely the opinions of the individual members of the court (Marvin vs. Kumbel, 23 *Wend.* 293). Since then, in the Court of Appeals (in Oakley vs. Aspinwall, 4 *Comst.* 514), it was held that the plaintiff in such case had no demand against the debtors arising upon *judgment*; and that the judgment was of no force against the party not brought into court, except such as was *expressly* given to it by statute; and an attachment against the defendant, not taken as an absent debtor founded on an affidavit stating that the plaintiff had a demand against the two *arising upon judgment*, was held bad. This is in accordance with the dissenting opinion of Justice BRONSON, in Marvin vs. Kumbel, above quoted, who held that an action of debt would not lie on such a judgment; and it has been held that such a judgment obtained in another state was void in our courts.

The decision that there was no demand against the defendant arising upon judgment, was substantially a decision that the judgment was not against him within the meaning of the act in question.* If the judgment were, properly speaking, against the defendant, it merged the original cause of action, and the plaintiff's demand was no longer on contract. The Court of Appeals, therefore, in holding that the plaintiff has not a demand arising on judgment, considered the original contract the only source of liability of the absent defendant.

The Code has still further, or more clearly limited the effect of such a judgment. It does not, as the laws of 1813 and 1830 did, enact that judgment should be against all the defendants in *the same manner as if all had been served with process;* but directly limits and qualifies the judgment, allowing it to be against all the defendants thus jointly indebted, and then imposing this limitation "*so far only* that it may be enforced against the joint property of all." This is a strict limitation, and makes it a judgment only against the property and not against

* D'Arcy vs. Ketchum, 11 *How. U. S. R.* 174.

the absent party. It is not now, properly speaking, a judgment against *him* any more than a judgment that a mortgagor be foreclosed of all equity of redemption, and that his property be sold and the mortgage debt be paid, is a judgment against the mortgagor, when he is not made liable for any deficiency. It is a judgment adverse to his rights and so against his interest or former title in the property, but is not a judgment against him personally.

Neither is it within the spirit of the non-imprisonment act to include such a defendant in its provisions. If a party has not been served with process, or sued, there are ample remedies furnished against him, if he has committed or contemplates any fraud. If he is about to remove his property out of the jurisdiction of the court to defraud his creditors, or is about to dispose of it; or has assigned, removed or disposed of it with the like intent, he can be proceeded against under that act, before any judgment is obtained (§ 4, sub. 1, 3, 4). The creditors, therefore, can suffer no injustice by waiting for a judgment. But if a judgment be obtained against the party and he has been served with process and had an opportunity to defend the suit, then the second subdivision properly applies to him and justly requires him to apply any rights of action or evidences of debt which he unjustly refuses to apply to the payment of any judgment against him. He unjustly refuses because he has personally had the opportunity to contest the claim, and it has been decided that *he* must pay it.

This subdivision also shows that it does not contemplate such a judgment as this; for if it applies, it applies in the full breadth of all its requirements; and then if this defendant refused to apply rights of action, evidences of debt, or his interest in any stock belonging to him alone and not to the partnership, he would be within the terms of this clause. The plaintiff might also in that case equally insist that here is a judgment against this defendant; that the statute speaks of *any judgment*, and so must include this; and then this inconsistency follows that a judgment that is to be enforced only against joint property, is enforced only against the sole property of one who never had the opportunity to contest it; and this in the very teeth of the statute

under which the judgment was obtained. In as much as this act where it does apply, gives a remedy as broad against the sole property of a defendant as against any property in which he is jointly interested with others, it can not be a lawful means of enforcing against a defendant not served with summons, a judgment which is entered against all the defendants "so far only as it may be enforced against the *joint property* of all and the special property and persons of those served.

When a statutory remedy is given, the one claiming its benefit has a right to all it gives, and if from the nature of his claim, it is plain that he is not entitled to all thus given, it is a fair conclusion that he is not within the statute.

Nor does public policy favor the plaintiffs' proceedings. It is against the policy of the law to allow one member of a firm to make an assignment giving a preference to creditors against the wishes of the other members of the firm. If these plaintiffs could succeed, they would secure a preference by concert with the defendant who confessed judgment to them—evidently that these plaintiffs might get the property in question for this defendant. Under this proceeding I am not to inquire whether the defendant holds back to secure all his creditors equally, or to defraud them. If the last be his object, there are means of frustrating him, which he could not well defeat when discharged from his imprisonment.

Let the prisoner, M. Lowenstein, be discharged from custody, and an order entered accordingly.

SUPREME COURT.

Lovett agt. Robinson and Witbeck Sheriff, &c.

A married woman, living and cohabiting with her husband, purchased goods upon credit and moved them to her residence, where she carried on the millinery business in her own name; it was held that these goods were liable to an execution against her husband for his debt.

It seems the 3d section of the act of 1848, as amended in 1849 (*L. of* 1849, *p.* 528), entitled an act for the more effectual protection of the property of married women, does not affect this case.

This cause was tried at the Rensselaer circuit in June 1852, by the court, without a jury. The facts are sufficiently stated in the opinion of the court.

Willard, Justice.—In the year 1851, the plaintiff purchased in New York, upon her own credit, a quantity of millinery goods, and removed them to her own residence in Troy, where she carried on business in her own name. At and before the said purchase she was a married woman, living and cohabiting with her husband in that place. She had no capital save her business capacity. Shortly after the goods were removed to Troy, the defendant Robinson, caused an execution to be issued upon a judgment recovered in his favor against S. Porter Lovett jr., the plaintiff's husband, in 1847, for $402.80, and to be levied by the defendant Witbeck, sheriff of Rensselaer, upon the said goods, as the property of the defendant in said execution. The present action is for the alleged wrongful taking of the said goods. On the trial two questions were raised by the defendants.

1st. That the action can not be maintained in the plaintiff's own name, without joining that of her husband; and 2d. That the legal title to the goods after the purchase by the wife, became vested in the husband, and was thus amenable to the execution under which they were taken. This latter objection strikes at the plaintiff's entire cause of action, on the merits, and if well taken, supersedes the necessity of considering the other point.

At common law the husband, upon the marriage, becomes en-

titled to all the goods and chattels of the wife, and to all sums of money which she earns by her skill or labor; and these he has absolutely in his own right, and not in hers (2 *Kent Com.* 130; *Clancy on Rights of Women*, 3; 2 *Barb. S. C. R.* 352). If she purchases goods during the coverture, with his assent, they become vested in him at the moment of the purchase, and he becomes responsible for the payment of them. His assent may be presumed from a variety of circumstances. She may be treated as his agent in making the purchase. Except in the character of agent, she can not, while living with her husband, bind him by her contracts. Such was the rule at law; but in equity the wife was allowed, through the medium of a trustee, to enjoy property as freely as a *feme sole*. The husband himself may be the trustee; and if property be settled to a married woman's separate use, and no trustee be appointed, the husband will be considered as such, notwithstanding he was a party to the instrument under which the wife claims (2 *Kent Com.* 162); and a court of equity will not aid the husband in obtaining the possession of his wife's estate, which he can not reach at law, without requiring him to make a suitable provision out of it for her and her children. And if a creditor of the husband invokes the aid of equity to reach the property of the wife and to apply it to the husband's debts, he must first submit to a proper allowance out of it in favor of the wife and her children. This is called the wife's equity.

This principle can not aid the plaintiff in this case. The plaintiff was cohabiting with her husband at the time of the purchase. Her credit, or business talents, belong to the husband. The purchase was for his benefit, and no consideration was paid or agreed to be paid but what belonged to him (see Petty vs. Anderson, 3 *Bing.* 170; *Clancy*, 27).

It is urged by the plaintiff, that the act for the more effectual protection of the property of married women, passed in April 1848, and amended in 1849 (*L. of* 1848, *p.* 307, and *L. of* 1849, *p.* 528), protect her rights in this case against the claims of her husband's creditors, and enable her to maintain an action as a *feme sole*. The 3d section of the act of 1848, as amended in 1849, so far as relates to this question, is as follows: "Any

married female may take by inheritance or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, &c. &c., in the same manner and with the like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband, nor be liable for his debts." This act was intended to secure to married women whatever they inherited from their ancestors, or received by gift, devise or bequest from any source, or acquired by grant from any person other than her husband, when the consideration for such grant was the sole and separate property of the wife. Thus the wife may not only hold as her own, a legacy bequeathed to her of a thousand dollars, but she may also hold in her own right a farm granted to her by a stranger, to whom she has paid the same thousand dollars. The act enables the courts to go further than the courts of equity formerly went in protecting the wife's equity. The difficulty which the plaintiff has to encounter is, the goods in question did not come to her by inheritance, devise or gift; nor by grant, for which she parted with any property to which she was solely entitled. The consideration which she agreed to pay belonged to her husband. The purchase, therefore, was the purchase of the husband, and the property was thus amenable to an execution against him.

The doctrine contended for on the part of the plaintiff will, if sound, enable married women, in all cases, to carry on the business of trade and merchandize, as *femes sole*, even while cohabiting with their husbands. This is not the law in this country, nor is it the law of England, except in the city of London. The custom of London is thus stated in 3 *Burrows*, 1776, "when a *feme covert* of a husband, useth any craft in the said city, on her sole account, whereof the husband meddleth nothing, such a woman shall be charged as a *feme sole*, concerning every thing that toucheth the craft," &c. &c. (see also *Clancey's Rights of Women*, 70). This custom has not been adopted in this country.

On the whole, I think the title to the goods in question was, at the time of the taking, in the husband, and was liable to seizure by an execution against him, and consequently for that reason, the complaint should be dismissed.

The People ex rel. Gemmill agt. Eldridge, County Judge, and Lansing.

On appeal from a justice of the peace to the County Court, the Code, § 354, provides that "the affidavit and notice of appeal must within the *like time* (20 days), be served on the justice, and a notice of the appeal on the *respondent* personally, or by leaving it at his residence with some person of suitable age and discretion."

The question is this, whether the affidavit and notice of appeal being served on the *justice* within the twenty days, but *not on the respondent until after the twenty days has expired*, the appeal is perfected so as to give the County Court jurisdiction? *Held* not.

The service of the notice of appeal on the respondent within the time, is not merely a directory statute, it is *imperative*. The section requires that certain things shall be done within twenty days, and if they are not *all* done, *there is no appeal*.

This is a jurisdictional question which can be taken advantage of at any time where there is no positive act of submission to the tribunal whose jurisdiction is questioned.

A *verbal* notice of appeal given to the respondent within the time amounts to nothing. It must be a notice in writing.

Where there is a failure to serve such notice as required by the statute, there can be no *amendment* allowed. There is nothing to amend, or amend by.

The court has no authority to allow an appeal to be brought after the time limited by statute has expired. (*This agrees with Tripp agt. De Bow*, 5 *How. Pr. R.* 114, *and Enos agt. Hunter*, *id.* 361, *and is adverse to Crittenden agt. Adams*, *id.* 310; *see* 6 *How. Pr. R.* 281.)

Dutchess Special Term, September 1852. *Application for a writ of prohibition.* Gemmill sued Lansing before a justice of the peace in Poughkeepsie, where plaintiff resides, and recovered judgment March 1st, 1852. The defendant prepared an affidavit and served it upon the justice with notice of appeal within twenty days, and also served notice upon the attorney who appeared for plaintiff before the justice; but did not serve any written notice on the plaintiff himself until April 19. The plaintiff moved before the County Court to dismiss the appeal, on the ground that no notice had been served on him within twenty days, as required by the Code; which motion was denied upon the ground that "the irregularity complained of should have been taken advantage of at the first opportunity," and that "by allowing a special

term to go by without moving to dismiss the appeal," the plaintiff "has waived his right to take advantage of the irregularity." The cause was thereupon directed to be heard upon the return at the next general term of the County Court. The plaintiff now applies for a writ of prohibition requiring the County Court to refrain from further proceedings in said cause.

H. A. NELSON, *for Relator.*

R. N. PALMER, *for Defendants.*

BARCULO, Justice.—The question is whether service of the affidavit and notice of appeal upon the *justice*, perfected the appeal so as to give the County Court jurisdiction of the cause. The Code, § 354, provides that "the affidavit and notice of appeal must within the like time (20 days), be served on the justice and a notice of the appeal on the respondent personally, or by leaving it at his residence with some person of suitable age and discretion." This constitutes, as I understand it, the appeal. I can not concur with the counsel for the defence in assuming that the service of notice is merely *directory*, and may be dispensed with; or that its absence may be supplied by other proof of information conveyed to the respondent. The section requires that certain things shall be done within the twenty days; and if they are not all done, *there is no appeal.* This is obvious from the context as well as the rule of construction which has been applied to superior courts. Thus section 359 declares that "when the affidavit and *notices* of appeal shall have been served, the respondent may supply or correct material omissions or misstatements therein, by an affidavit on his part, a copy of which shall be served on the justice, and also on the attorney, if any, who prosecutes the appeal, or if there be none, on the appellant, within ten days after receiving notice of the appeal." "The court (§ 360) shall thereupon, after ten days, *and within thirty days* after the service of the notice of appeal, make a return," &c. From these provisions it appears that the notice of appeal *must* be served on the respondent within the twenty days, to authorize him to supply or correct the affidavit of the appellant within the thirty days given to the justice to make the return. Otherwise the respondent loses the opportunity of furnishing an affidavit

on his part, as the justice, in making his return, must be governed by the notice *served on him.* The case before us illustrates this matter. The affidavit and notice of appeal were served on the justice on the 4th of March, he makes his return the fore part of April, as he is required; and on the 19th April the appellant first serves notice of the appeal upon the respondent, so that the latter is cut off from his right to correct the affidavits of the appellant. It is not intended to be said that the County Court could not relieve a party under such circumstances, who should come in and submit to the jurisdiction and ask for an amended return; but these sections show that the notice to the respondent is a *part of the appeal*, without which it is imperfect.

2. We will now look at the analagous case of appeals in superior courts. Section 327 provides that "an appeal must be made by the service of a notice in writing, on the adverse party, and on the clerk," &c. In the case of Tripp agt. De Bow (5 *Pr. R.* 144), the notice of appeal from a judgment of the County Court to this court was served upon the *party* instead of his attorney. On a motion to dismiss the appeal made at the Ontario special term, the justice held that the notice should have been served on the attorney, and that the statute not having been complied with, nor the error waived by an appearance, the court had acquired *no jurisdiction*, and the appeal sought to be taken *was a nullity*. This decision was affirmed at the general term; the court declaring it to be a "jurisdictional question," which "the party has a right to take advantage of at any time, provided he has not appeared or answered, or proceeded in such a manner as to give the court thereby jurisdiction in the case."

Now the essential difference between the two provisions of the statute is, that in regard to appeals in the superior courts, the notice must be served on the attorney, and in appeals from a justice of the peace, the notice must be served on the party personally, or by leaving it at his residence with some person of suitable age and discretion. If then it was correctly held, of which I have no doubt, in Tripp agt. De Bow, that a notice served on the party and not on the attorney in an appeal to the Supreme Court was a nullity, the converse, as applied to the present case, must also be true that the notice being served on the attorney

and not on the party, as required by the statute, is a nullity, and consequently that there was no appeal by which the County Court could obtain jurisdiction. The county judge, therefore, in holding this to be a case of mere irregularity overlooked the broad distinction between a question of practice and a question of jurisdiction. The former may be waived by delay; but the latter can never be waived by mere lapse of time, but only by some positive act of submission to the tribunal whose jurisdiction is questioned.

3. But it is claimed that the affidavits show that the respondent had verbal notice of the appeal, or, in other words, that he admitted and stated in conversation, the judgment had been appealed. This, however, can not affect the question unless it can be shown that *a written notice is unnecessary.* But the section itself negatives the idea, by providing as an alternative, that it may be served " by leaving it at his residence."

Again, section 408 defines what is meant by a notice, by declaring that " all notices shall be in writing," and although that chapter may not be intended particularly to apply to these appeals, it furnishes a strong presumption that the Code makers intended by the term " notice," whenever used generally, to designate a written, and not an oral communication.

4. But it is contended that the defect is amendable. To this two answers may be given. First, the appellant has not applied to the County Court to amend, nor has any amendment been ordered. Secondly, there is nothing to amend, nor to amend by. If the notice had been served, and had been defective in some matter of form, or perhaps, of substance, I could understand what is meant by " amending." But here is *no* notice, and the party, under the head of amendments, asks to bring an appeal after the time limited by statute has expired. This no court has the authority to do in my judgment. We may just as well extend the time for bringing an action beyond the period fixed by the statute of limitations, or order an execution to run beyond the time fixed for the lien of a judgment.

It is true that section 327 allows amendments in cases of appeal, but it provides as a *sine qua non*, that the party shall have given, in good faith, " notice of appeal."

I am also aware that in the case of Crittenden agt. Adams (5 *How. Pr. R.* 310), Justice MASON held that the court had the power to authorize an appeal to be taken after the expiration of the time limited by the Code. But that decision is in direct conflict with that of Tripp agt. De Bow, and also with Enos agt. Thomas and Hunter (5 *How. Pr. R.* 361), decided by the general term in the third district, and I can not follow it.

The right of appeal is a *restricted* right. The legislature regulate and control it as they please. The presumption is that the first tribunal is competent to dispose properly of the matters submitted to it, and that its decisions are correct. The law, however, gives an opportunity to review the first adjudication, upon a compliance with certain conditions on the part of the party feeling aggrieved. Among those conditions is found a limitation as to time, which, while it gives a full opportunity to appeal, is designed to cut off that right forever if the parties do not avail themselves of it in season. The party who loses the privilege by his delay or negligence, has no one to blame but himself. The courts can not help him without abolishing the law and substituting themselves in the place of the legislature.

In the present case the County Court, unless restrained, will proceed to judgment on the return. In that event it is difficult to see how the relator can avail himself of this defect of jurisdiction. I am inclined to think he has no remedy if the application is denied. I shall, therefore, direct an alternative writ to be issued, that the question may be examined at the general term.

Writ of prohibition granted.

SUPREME COURT.

Lynch Respondent agt. McBeth Appellant.

The Supreme Court exercises, on an appeal from a County Court in a cause originating in a Justice's Court, merely an appellate jurisdiction, and can review only decisions *actually made* by the County Court.

Where the appeal is founded upon some irregularity or error not contained in the proceedings before the justice, such error must appear by the appellant's affidavit (*Code of* 1851, § 353). This statement and the respondent's counter affidavit are in such cases equivalent to an *assignment of errors of fact* (Adsit agt. Wilson, *ante p.* 64, 68).

The declaration of a party can not be made evidence in his own favor, on the ground that they were made in a conversation, part of which is called out on a cross-examination by the other party.

Parol evidence is inadmissible to vary the terms of an agreement, under seal, until it is shown that the sealed contract had been previously broken, rescinded, abandoned or had expired.

Where the return of the justice does not contain any legal evidence to support his judgment, the judgment should be reversed.

Chautauque General Term, September 1852. *Present,* Taggart, *P. J.,* Marvin, Hoyt and Mullett, *Justices. Appeal from a judgment of the Erie County Court, affirming a judgment of a Justice's Court, on appeal, taken in* 1851. This action was commenced December 5th, 1850, and was tried by the justice without a jury, January 2, 1851. The plaintiff, in his complaint stated in substance, that between the 12th of March and the 1st of December 1850, he performed divers services, work and labor, for the defendant, and furnished lumber and materials, for which the defendant was indebted to him in the sum of $100, and demanded judgment for that amount. The defendant by his answer denied each and every allegation in the complaint, and stated further that he and the plaintiff, about the 1st of August 1850, entered into a contract under seal, whereby the plaintiff agreed to build and finish a house in the city of Buffalo, for the defendant. That the plaintiff never fulfilled the contract according to its conditions, but wholly failed so to do, to the defendant's damage $100; and the defendant, in his answer, further stated that he would prove a set off to any claim that the plaintiff might prove, in promissory notes and receipts against the

plaintiff, to the amount of $100. The justice's return states in substance, that upon the trial the plaintiff's counsel introduced a witness who gave evidence tending to prove the doing of work by the plaintiff, and his hands, on a house, on Heacock street, in the city of Buffalo, and described the work, and said *he* worked on the house, for the plaintiff, some time; that while he was at work there, he saw the defendant there talking with the plaintiff. On his cross-examination by the defendant, the witness said he did not know the defendant then, but after he had gone, the plaintiff told him he was the defendant (Mr. McBeth), and said he could not get money of him to go on with the work. The plaintiff's counsel then asked the witness why the plaintiff did not go on with the work? The defendant's counsel objected to this evidence on the ground of incompetency, as the justice's return states, but the justice decided that the "plaintiff had a right to call for the whole conversation which the defendant had opened," to which decision the defendant objected; but the question was put to the witness, who answered that the plaintiff told him the defendant would not pay him as fast as he got along with the work, and that *that* was the reason why he would not go any further. The plaintiff's counsel, after introducing several other witnesses who gave evidence tending to prove the work done, and caused to be done, by the plaintiff, on the house, and the value of the work, and of the materials furnished by the plaintiff, *rested his case.* The defendant's counsel then produced and proved a sealed instrument executed by the plaintiff, dated August 1st, 1850, which commenced thus: "Specifications for a house to be finished for J. McBeth, on Heacock street, in the city of Buffalo." Then followed a particular description of the house, the manner in which it was to be finished, and the materials of which it was to be made, and concluded as follows: "The above to be completed, ready to occupy, on or before the first day of November next, for the sum of four hundred dollars; forty dollars of which are to be applied on C. B. Lynch's note, and the remainder to be paid as soon as the job is finished. I hereby bind myself to John McBeth in the sum of five hundred dollars to fulfil the above contract. Dated Wales Center, August 1st, 1850." Signed "C. B. Lynch, and sealed.

The plaintiff was then called and sworn as a witness, on the part of the defendant, and gave some evidence respecting the identity of the plan of the house which was shown to him. The defendant then gave other evidence tending to show that the house was not completed on the first day of December 1851; that he employed other men to finish it, and the expense of such finishing. The defendant then recalled the plaintiff, who testified that he had never done any other work for the defendant in Buffalo, before this, or made any other contract with the defendant in Buffalo. He also said that he did not enter into the work on the house, on the terms of the written contract exactly. It was not according to that contract. The plaintiff then gave some evidence tending to prove that while he was doing the work on the house, he called on the defendant for money to enable him to go on with the work, and informed the defendant that he must have money before he could proceed with the work he was doing for him; and that the work would have to stay until he furnished the means according to agreement, and that these calls upon the defendant were repeated several times.

The plaintiff was then produced as a witness in his own behalf, and his counsel proposed to prove by him a further or other agreement than the sealed one, which had been produced, under which he did the work on the house. To this the defendant's counsel objected, on the ground that parol evidence was inadmissible to vary the terms of another agreement under seal. But the court decided that the plaintiff might show another agreement as proposed. The plaintiff then testified in substance, that he employed men to put the foundation and frame in order; and went on to do the work on condition that he was to have money from time to time, as the work progressed along, for the purpose of doing the building, from the defendant; that the reason why he did not go on with the work was the want of money from the defendant to do it. That he frequently called on the defendant for money and told him he would not do any more unless he had money to do it with. That on such answer the defendant talked about getting money. That on the 12th of August the defendant let him have a $100 and took his note for it. That at another time the defendant left him $25, but had paid him no more since.

That the reason why he did not go on and finish the house was that the defendant failed to furnish means for that purpose, as he had agreed to do, after the written agreement was signed. That the defendant had told him since the written contract was signed, if he would go on, he, the defendant, would furnish money as the work went on. The plaintiff gave some other testimony in reference to the work which he had done, its value &c., and the giving of the $100 note on the 12th of August 1850, which he admitted was given for money advanced by the defendant, pursuant to the parol understanding which he had mentioned, though he said he wanted to give a receipt instead of a note, if he was not mistaken. The note was produced and was as follows: "$100. On or before the first day of November next, for value received, I promise to pay John McBeth or bearer, one hundred dollars with interest. August 12th, 1850." Signed, "Cyrenus B. Lynch."

The defendant proved by the man who delivered the $100 to the plaintiff for the defendant, and took the note, that the note was read to the plaintiff before he signed it. That the plaintiff said "giving a note he supposed was the understanding;" proposed to give a receipt, but signed the note, and said he should want some more money by the close of the following week. That the witness then told the plaintiff that the defendant said he would let him have money as any other neighbor. Upon the above evidence and proceedings the cause was submitted to the justice, who gave judgment for the plaintiff for $86·66 damages and the costs. This judgment was, on appeal, sustained by the County Court, whose judgment is now brought here for review.

A. Sawin, *for Appellant.*

H. Seymour Jr., *for Respondent.*

By the Court, Mullett, Justice.—This is an appeal from a judgment of a County Court, rendered in December 1851, affirming a judgment of a Justice's Court. It is clear that in such cases, this court exercises merely an appellate jurisdiction, and can review only the decisions of the County Courts, actually made upon matters brought and litigated, or claimed, before those courts (Dorr agt. Birge and Wells, 5 *How. Pr. R.* 323, and the

cases there referred to). It would, therefore, seem to be an important preliminary step in the investigation of such cases, to ascertain what those matters were. By the statute providing for appeals from courts of justices of the peace, to County Courts, the appellant, to take an appeal, is required to make or cause to be made, an affidavit stating the substance of the testimony and proceedings before the court below, *and the grounds upon which the appeal* is founded (*Code of* 1851, § 353). Under the Code of 1848, which was in this respect the same as the present Code, the Oneida County Court (1 *Code Rep.* 103), and the Superior Court of the city of New York (2 *Sand. S. C. R.* 632, *and note*), decided that unless this requirement was complied with, by a particular specification of the grounds upon which the appeal was founded, the appeal was invalid and should be dismissed. This construction is in accordance with the letter of the statute, and if adhered to would add much to the regularity and certainty of proceedings on appeal in the County Courts, and save this court some labor and difficulty in reviewing the decisions of the County Courts in such cases. But a similar requirement, in affidavits for the removal of causes from justices' courts to the common pleas, by certiorari, and expressed in nearly the same words (2 *R. S.* 255, § 171), was considered by the Supreme Court sufficiently complied with by an affidavit setting forth the substance of the testimony and proceedings before the justice, containing statements of the errors alleged to have been committed by him, without the addition of a more particular statement of the grounds upon which the allegations of error are founded (6 *Wend.* 544; 8 *id.* 509; 18 *id.* 550). This was the construction put upon the Revised Statute immediately after its adoption, and adhered to until the statute was superseded by the Code, and it is hardly to be supposed that the commissioners of the Code, or the legislature, desired or expected a different construction from the use of the same words; nor is the necessity for a particular and formal statement of the grounds upon which the justice's judgment is sought to be reversed, so far as they are included in the proceeding before the justice, increased by changing the mode of review from a certiorari, to an appeal. In both cases the cause is reviewed, in respect to the proceedings before the justice as it

appears on his return. By the former practice, the justice was required, in his return, truly and fully to answer all the facts set forth in the affidavit on which the certiorari was allowed. But if the affidavit did not show in the proceedings, or set forth any grounds of error, it was the duty of the common pleas to quash the certiorari, and the Supreme Court would grant a mandamus to compel it to do so (18 *Wend.* 550). If the ground alleged for error, was error of fact, which the justice could not answer, it was brought before the court by an assignment of error of fact (12 *Wend.* 266). By the present system the appellant's affidavit and the respondent's counter affidavit, if he sees proper to make one, are both served on the justice before he makes his return, and he is required to make a return to the appellate court, of the testimony, proceedings and judgment. The justice's return is in some measure responsive to the affidavits of both parties, and either party may apply to have the return amended, if necessary. When the return is complete, it shows to the County Court, with sufficient certainty, the erroneous proceedings and decisions of the Justice's Court, so far as the appeal is founded on them, without a more formal specification. But when the appeal is founded on some irregularity or error not contained in the proceedings before the justice, or in the language of the 366th section of the Code, when the appeal is founded on an error in fact, in the proceedings, not affecting the *merits* of the action, and not within the knowledge of the justice, the return can give the County Court no information on the subject. In such cases no errors or irregularities can be brought before the County Court, except by the appellant's affidavit. He must, therefore, state in his affidavit, in addition to his statement of the testimony and proceedings before the justice, the grounds upon which his appeal is founded. This statement and the respondent's counter affidavit are in such cases equivalent to an assignment of error of fact, and the answer thereto, and present questions which the court may determine upon affidavit or upon the examination of witnesses (*Code of* 1851, § 366). This is clearly a simplification and improvement of the old system. In the case under consideration the errors complained of, if there were any, and upon which the appeal to the County Court was founded, were contained in

the proceedings before the justice, and were committed by him. These are sufficiently apparent upon the justice's return to the County Court. The matters brought before us for review, are the judgment of the County Court, affirming the judgment of the Justice's Court, and the premises on which it was found, and an examination must be confined to these subjects. The first material erroneous decision of the justice, which appears on the proceedings returned by him, was that by which he permitted the plaintiff to prove an important part of his assumed case, by his own declarations to third persons. The plaintiff had pretended to justify himself in abandoning the work he had undertaken to do for the defendant, at a specified price, and charge for what he had done, by showing a failure on the part of the defendant to furnish funds as he had agreed to do, to enable the plaintiff to proceed with the work. Harper, a witness for the plaintiff, had testified that he worked for some time for the plaintiff on the house which he was building on Heacock street. That while he was at work he saw the defendant there talking with the plaintiff. On his cross-examination by the defendant the witness said, in substance, that he did not know the defendant then, but after he went away the plaintiff told him that he was the defendant, and that he could not get money from him to go on with the work. The plaintiff's counsel on a reëxamination of the same witness, asked him why the plaintiff did not go on with the work, and the justice under the objection of the defendant, permitted the witness to testify that the plaintiff told him that the reason why he did not go on with the work was, that the defendant would not pay him as fast as he got along, under the pretence that *that* was a part of the conversation which the defendant had called out on the cross-examination. The whole subject of the cross-examination, so far as it is embraced by the question under consideration, was the knowledge which the witness had, that the man whom he saw talking with the plaintiff was the defendant. When he had answered that he had no knowledge of that fact, except what he got from the plaintiff, his cross-examination upon that point was exhausted. He had no right to go on and state what the plaintiff told him, nor does it appear by the justice's return that the defendant inquired what

the plaintiff told the witness, even on that subject; and if he had it did not authorize the plaintiff to call for his own declaration, on an entirely different subject, although they might have been made at the same time, or in the same conversation. This permission of the plaintiff to introduce his own statement as evidence, to prove the most important part of his case, was, to say the least of it, a palpable misapplication of the rule of evidence, which was referred to to justify it. Another material error committed by the justice on the trial, as appears by his return, was permitting the plaintiff to prove by parol a further or other agreement than the sealed one, under which he built the house, without showing that the said contract had been broken, rescinded, abandoned or had expired. This was objected to by the defendant, on the ground that parol evidence was inadmissible to vary the terms of another subsisting agreement on the same subject, under seal. But the justice permitted the plaintiff to give evidence tending to show a parol agreement on the subject of the sealed contract, while that was in full force, materially varying the terms of the covenant against the defendant, as the ground upon which the plaintiff's action was founded. This was a violation of a well settled rule of law to which it is believed there is no recognized exception (13 *Wend.* 71; 21 *id.* 628; 23 *id.* 82; 4 *Hill*, 584). The County Court should have reversed the judgment of the Justice's Court on these grounds. In addition to the above errors, the justice's judgment was *clearly* wrong upon the merits, and contrary to the justice of the case, as it appeared upon the trial. The justice certifies that his return contains the substance of the testimony and proceedings had before him, and yet it does not contain any legal evidence to support his judgment. The defendant proved that the plaintiff was under a covenant to do the work which he did for the defendant The plaintiff attempted to show that this covenant was varied by a subsequent parol agreement. Besides the incompetency of parol evidence to have that effect, the plaintiff did not, even with the help of his own testimony, prove any parol attempt to vary the sealed contract. There was nothing in the conversation which he testified to, purporting to release him from any of the obligations of his covenant, or to impose any new obligation, in that

respect upon the defendant; the most that the plaintiff's testimony on this subject tended to show, was a parol promise of the defendant, without any consideration, to let the plaintiff have money as fast as he wanted it, to go on with the work; not as payment for the work, nor in lieu of the payments which the plaintiff had covenanted to receive when the work was done. This was wholly insufficient to produce the effect claimed for it by the plaintiff, and given to it by the justice. In such a case the County Court ought to have reversed the judgment of the Justice's Court, and erred in not doing so (Carter vs. Dallimore and others, 2 *Sand. S. C. Rep.* 222; Adsit agt. Wilson & Chamberlain, *ante p.* 64). For the above errors the judgment of the County Court must be reversed. The judgment of the County Court and that of the Justice are reversed.

SUPREME COURT.

ROSCOE Executor &c. of MAISON agt. MAISON AND OTHERS.

Under § 157 of Code the *attorney* can verify a pleading (giving sufficient reasons) instead of the *party*, whenever the party is absent from the county where the attorney resides, and such absence is itself a sufficient reason.

Where a plaintiff elects to reply, he can not on a question of verification, deny that he was bound to reply. And can not allege as a reason that the answer does not set up a *counter claim*. What is a *counter claim*?

Dutchess Special Term, September 1852. The plaintiff, as executor, brings suit to obtain certain assets which, as he alleges, are in the hands of the defendant L. Maison. The latter puts in his answer claiming to hold the property by virtue of a conveyance and assignment executed to him by the testatrix in her life time. The complaint is not verified; the answer is verified. The plaintiff replies, denying, among other things, the capacity of the testatrix at the time of making the conveyance, and avering his belief that it was obtained by fraud, &c. The verification of the reply is as follows:

"*Sullivan County, ss:* Charles H. Van Wyck, being sworn, says he is attorney for plaintiffs; that the matters stated in the above reply are true of his own knowledge, except as to the matters herein stated on information and belief, and as to those matters he believes it to be true. That deponent resides in the county of Sullivan and the plaintiff in the county of Westchester, and that the facts stated in this reply are as well and some of them more fully known to this deponent than to the plaintiff."

The defendant, L. Maison, moves to strike out the reply because it is not sufficiently verified.

L. MAISON, *for the Motion.*

JAS. EMOTT, *for Plaintiffs.*

BARCULO, Justice.—Section 156 of the Code requires that "when any pleading is verified, every subsequent pleading, except a demurrer, must also be verified." The defendant, therefore, having verified his answer, is entitled to have the reply verified. The question is whether the oath of the attorney is sufficient under the circumstances of the case.

Section 157 provides that the verification "must be by the affidavit of the party—or if there be several parties united in interest, and pleading together, by one at least of such parties acquainted with the facts—if such party be within the county where the attorney resides, and capable of making the affidavit." It is somewhat remarkable that no provision is made for the very common case of a party not being in the county where the attorney resides. In the case before us the attorney resides in Sullivan and the plaintiff in Westchester county. Is the party, therefore, excused from making the affidavit personally? This seems to me to be in itself a very poor reason. If pleadings are verified for the purpose of compelling parties to plead the truth and thus narrow down the issues it would seem that some more potent reason should be given than the mere intervention of a county line between the client and attorney.

It would seem, however, on comparing this section in the Code of 1851 with the corresponding section in the Code of 1849, which permits the affidavit to be made either by the party or his

attorney, if the former is absent from the county, that the same construction should be applied to the present act. My conclusion therefore is, that in this case the reply could be verified by the attorney, upon the ground that his client was absent from the county of Sullivan, and as the attorney swears substantially to that fact, he states a sufficient reason for making the affidavit himself. I regret the necessity of denying this motion, because the construction of the act reduces the system of verification to mere form, and enables any party by leaving the county, or, by employing an attorney out of the county, to evade the oath at all times. But it is not my business to make the Code wise, or reasonable, or consistent. All I can do is to exempt the defendant from costs of this motion, which he has probably been drawn into by the imperfections and ambiguities of the section in question.

I can not, however, concur with the counsel who contended that the motion should be denied on the ground that the answer does not contain a *counter claim*, and therefore need not be replied to at all under section 253 of the last Code. A sufficient answer to that position is, that the plaintiff having elected to reply, can not, on the question of verification, deny that he was bound to reply. Besides, I am not clear that the answer does not set up a counter claim. It states, in answer to the claim of plaintiff under a will, that the testatrix in her life time, by deed conveyed the property in question to the defendant. This is a claim by an independent and hostile title to the same property. It is therefore a claim, in some respects, counter or contrary to the claim of the plaintiff, whether it falls within the term "counter claim" or not. It is unnecessary to attempt to define the precise meaning of this unfortunate compound which has been pressed, by our modern Solons, into the service of the *fourth*, and it is to be hoped, the *last* edition of the Code. It requires, however, but little knowledge of the past to foresee that this superfluous interpolation which is not found in our best dictionaries, and has been hitherto unknown to our statutes, will furnish a new source of litigation, and contribute its share towards unsettling what remains of good pleading.

The motion is denied without costs.

SUPREME COURT.

The People ex rel. Coleman agt. Dikeman.

A mandamus will not be ordered at the suit of a person who has another appropriate and *adequate* remedy.

A mandamus is inappropriate, where there is a real and substantial dispute as to the title to an office.

Where the right of the applicant is clear and unquestionable, and the possession of the official books and papers is all that is necessary to enable him to perform fully and satisfactorily the duties of his office, a resort should be had to the summary process given by the statute (1 *R. S.* 124).

But where the title of the applicant is beyond a substantial dispute, and the possession of the books and papers would not give him the entire control of the office, and the remedy by the "action in place of *quo warranto*," would be so dilatory as to amount to a failure of justice, then the writ of mandamus should be awarded.

The case of The People vs. Steele (2 *Barb. S. C. Rep.* 398), not fully approved.

On an application for a mandamus the affidavit must not be entitled. The 406th section of the Code does not affect proceedings upon mandamus.

Kings County Special Term, September 1852. *Application for an alternative mandamus.* The trustees of the village of Williamsburgh, Kings county, were by an act of the legislature of May 21, 1836, authorized to erect therein cells and prison rooms for the confinement and detention of prisoners from the town of Bushwick and from said village: and also from time to time to appoint a cells keeper, whose compensation was to be paid by the county. By an act of the 15th March 1848, the electors of said village were authorized to elect a cells keeper, who was to hold his office for one year and until a successor should be elected and duly qualified. The defendant was duly elected cells keeper under said last mentioned act, at the village charter election on the 2d Tuesday of April 1851, and has continued thereunder to discharge the duties of said office.

The city of Williamsburgh was incorporated by an act of the legislature of April 7th, 1851, which took effect as to the election of officers on the day of the next general election, and as to the residue of the charter on first Monday of January 1852.

Under it, the term of all officers elected or appointed under the village charter was to expire on the first Monday of January 1852. It repeals the act of 1848, and several other named acts, and all acts and parts of acts inconsistent with the charter. By the 11th section of title 10, "the city of Williamsburgh succeed to all the rights and liabilities of the corporation of the trustees of the village of Williamsburgh," &c. By the 11th section of title 2, the common council shall have "power to make," &c. "ordinances, rules, regulations and by-laws, to manage and regulate the real and personal property of the city," and also "to make," &c. "all such other ordinances," &c. "as they may deem necessary and proper for the good government and prosperity," &c. "of the city and its inhabitants." There is no express provision in the charter as to the election or appointment of cells keeper.

On the second day of February 1852, the common council (as appears from an extract from their minutes) proceeded to ballot for cells keeper and on the fourth ballot the relator received seven out of twelve votes, and was declared elected. On defendant's refusal to surrender the office, the relator obtained an order to show cause why an alternative mandamus should not issue. The relator's papers were entitled as in the action.

WM. RICHARDS and E. D. CULVER, *for Relator.*

JOHN DEAN, *for Defendant*, cited the following authorities: 5 *Hill*, 616; 2 *Barb. R.* 513; 3 *Johns. Cas.* 79; *Angel & Ames on Corporations*, 709; *Wilcox on Corp.* 356, 357, 363; 10 *Wend.* 393; *Code*, § 432; 2 *Comstock*, 490; 3 *T. R.* 575; 2 *Hill*, 196.

S. B. STRONG, Justice.—The relator claims to be the duly appointed keeper of the cells or prison rooms in the city of Williamsburgh, and has applied to this court to issue a writ of mandamus, requiring the defendant, who is in the actual occupancy of such cells or prison rooms, by virtue or under color of an election to the office of keeper by the inhabitants of the then village, now city of Williamsburgh, on the second Tuesday in April 1851, to admit the relator to the possession of the property, and to the performance of the duties of the office. The following is a

statement of the facts upon which the application is made and resisted:

The act of May 20th, 1836, relative to the confinement of certain persons in the village of Williamsburgh and town of Bushwick, authorized *the trustees of such village* to erect and prepare cells and prison rooms for the confinement of persons arrested on criminal accusations, and detained for examination or trial, and to appoint from time to time some suitable person to be keeper thereof, and to make rules and regulations for the detention and support of the prisoners. Under that act the trustees erected and prepared the cells, and from time to time appointed the keeper, until the act of the 15th of March 1848, relative to the town and village of Williamsburgh was passed. That act provided that such keeper should be *elected* in the said village for one year, and until a successor should be elected and duly qualified, but did not make any other change in, or to any greater extent repeal the act of May 20, 1836. The defendant was elected to the office of keeper by the voters of the village of Williamsburgh on the second Tuesday in April 1851. The act to incorporate the city of Williamsburgh was passed on the 7th April 1851, and took effect, as to the election of its officers on the day of the next general election, and in all other respects on the first Monday in January 1852. That act contains no specific provisions as to the election or appointment of keeper of the cells, but it expressly repeals the act of March 15, 1848. The 13th section of the 10th title provides that the officers to be elected at the town and charter election in April 1851, should hold their offices until the first Monday in January 1852, when their terms of office should expire, as should also the terms of all persons holding office by appointment from the trustees of the village elected at such election. The 11th section of the same title provides that the *City of Williamsburgh* shall succeed to all the *rights* and liabilities of the former *corporation* under the name of the Trustees of the village of Williamsburgh. There are some other provisions of the city charter which I may deem it necessary to quote, and their applicability (if any) to this controversy may be seen. On the 2d of February 1852, the board of aldermen (all the members being present) pursuant to a vote

then adopted, balloted for a keeper of the cells; and on the third ballot the relator received seven votes, being a majority of the whole number, and was declared elected.

The defendant objects to the affidavit on which the application is made that it is entitled in a suit, and that, as no suit was pending when it was made, that is a fatal defect. I am inclined to think that the objection is well founded (1 *Wend.* 291; 2 *John. R.* 271; 5 *D. & E.* 466). The 406th section of the Code declares that it shall not be necessary to entitle an affidavit in the action, but that an affidavit made without a title, or with a defective title be as valid and effectual for any purpose as if it was duly entitled, if it intelligibly refer to the action or proceeding in which it is made. This does not refer in terms to an affidavit which is entitled when it should not have been entitled at all; and if it had done so the 471st section expressly declares that until the legislature shall otherwise provide (which it has not done), the Code "shall not affect proceedings upon mandamus." As it is desirable, however, that the application should be decided on the merits, and there is a stipulation between the parties which in effect waives any objection that is merely formal, I shall proceed to discuss very briefly the material questions involved in this controversy. It has been long a settled general rule that a mandamus will not be ordered at the suit of a person who under the circumstances has another appropriate and adequate remedy. There is not, perhaps, any very good reason for continuing the rule, except that having always prevailed it can not now be changed by any power short of the legislature; but until thus changed it must prevail in our judicial tribunals. The Code undoubtedly in most cases provides another adequate remedy for one from whom an office is unlawfully withheld. By the 435th section and the six following sections an action may be brought by the attorney general in the name of the people, upon the complaint of any person rightfully entitled to an office, in which judgment shall be rendered upon the rights of both parties, and if the claimant prevail he may promptly obtain the books and papers of the office, damages by reason of its being usurped by his competitor, and the exclusion of such competitor from "the office, franchise or privilege," and recover the costs of

suit, and the defendant may be fined in a sum not exceeding two thousand dollars. These remedies are sufficient in all ordinary cases, and then a mandamus is unnecessary, and should not be granted. When, however, the title to an office preferred by a claimant is perfectly clear, and his admission to perform its duties and receive the emoluments, is resisted by a previous incumbent without a color of right, a mandamus for its sometimes speedy, and always energetic operation may be an appropriate remedy, and should then be issued. There can, in such cases, be no reason for the delay usually attendant upon the proceedings substituted by the Code for the ancient writ of *quo warranto.* Indeed, such delay might in many cases be fatal to any substantial relief, as the term of office might expire before a judgment could be obtained. In such cases a summary process is given by the Revised Statutes (1. *R. S.* 124. 125) to compel the delivery of books and papers by (late) public officers to their successors; and where the possession of such books and papers is all that is requisite to enable the officer to perform his duties, that should be the only remedy; or at any rate a resort could not be had to the writ of mandamus according to the rule which I have mentioned. But in the case under consideration the control of the official books and papers, would not alone enable the applicant to perform the duties of the office. He would still need some additional measures to give him possession of the cell or prison rooms, and the custody of the prisoners.

The principles which I am disposed to lay down in this case are, 1st. That a mandamus is inappropriate and should not be issued where there is a real and substantial dispute as to the title to an office. 2d. That where the right of the applicant is clear and unquestionable, and the possession of the official books and papers is all that is necessary to enable him to perform fully and satisfactorily the duties of the office, a resort should be had to the summary process given by the statute to obtain such books and papers, and a mandamus being unnecessary should not be awarded. But 3d. That when the title of an applicant to an office is beyond a substantial dispute, so that the objection to it is wholly frivolous, and the possession of the books and papers would not give him the entire control of the office, the remedy

by the proceedings substituted by our new Code for the writ of *quo warranto* would in many cases be so dilatory as to amount to a failure of justice, and the writ of mandamus would be proper and should be awarded. The case of The People vs. Steele (2 *Barb. S. C. R.* 307), would seem to extend the remedy by mandamus much further than I have gone in proceedings against corporations and ministerial officers; but the authorities quoted by the learned judge who decided that case do not warrant the extension of the rule in such cases beyond its ancient and well settled limits.

It is incumbent upon the applicant in this case to show that he has a clear right to the office in question, as the first requisite to entitle him to a mandamus. Has he done so? We have seen that the right to appoint the keeper of the cell in Williamsburgh was conferred by the act of 1836 upon the trustees; that such right was taken from them and the office made elective by the voters of the village by the act passed in 1848, which was in force when the city charter was granted. That charter does not in terms, confer the right to elect this officer upon the voters of the city, nor to make the appointment upon the board of aldermen. It was contended, however, by the counsel for the relator, that the right to make such appointment, although not specially mentioned, was included in some of the general powers conferred upon the common council. The 12th section of the second title, to which my attention was called, relates wholly to ordinances, rules, police regulations and by-laws necessary to carry into effect the powers conferred upon it by the charter, and also such as might be necessary and proper for the good government, order and protection of the persons and property, and for the preservation of the public health, peace and prosperity of the city and its inhabitants. If this section confers the power to pass an ordinance, rule, regulation or by-law for the appointment of the officer in question (which I am satisfied it does not), it no where appears that it has been exercised. The balloting and declaration were neither an ordinance, rule, regulation or by-law. Either of those provisions to be effectual must first be presented to the mayor, and either approved by him or (if vetoed) subsequently adopted by a two-third vote; whereas a simple appoint-

ment is effected by going into a ballot, and declaring its successful result, and is not subject to the veto power (*Title* 10, § 1 *of the City Charter*).

It was contended by the relator that by the repeal of the act of 1848, the power of making the appointment in question was again vested in the trustees under the act of 1836, on the well settled principle that the abrogation of a repealing statute revives the original enactment. The rule is general but not universal. If in this instance the act of 1836, had again become fully operative it would have restored the power of making the appointment to the same officers, but that could not be, as there were no longer any *trustees of the village* when the act incorporating the city took effect. True the aldermen of the city were, to a considerable extent, clothed with powers similar to those formerly possessed by the trustees of the village. But they were new officers, and when it was designed that there should be a continuance of power it was specially mentioned, except perhaps in the provision to which I shall presently refer. There was no direct devolution of all the powers of the old board upon the new one. In such cases the substituted officers take their power by enactment and not by succession. They have nothing except what is conferred upon them by their charter, either expressly or incidentally. The charter, as I have before intimated, does not in terms confer the power in question on the aldermen, neither does it clothe them with all the powers formerly possessed by the trustees, nor is the power in question incidental to any other expressly granted.

The only provision in the charter under which the power in question can be claimed by the city corporation through *any* of its departments, electoral, administrative or legislative, is contained in the 11th section of title 10. It is, in substance, that the corporation of the city of Williamsburgh should succeed to all the *rights* of the former corporation under the name of the *Trustees* of the *Village* of Williamsburgh. The word "right" is defined by lexicographers to denote, among other things, property, interest, *power, prerogative,* immunity, *privilege* (*Walker's Dict.* word "Right"). In law it is most frequently applied to property in its restricted sense, but it is often used to designate

power, prerogative and privilege, and especially when applied to corporations. Indeed, a large proportion of the rights of political corporations consists of the powers conferred upon them. Corporate powers are not generally exercised by the whole body. They are, to a great extent, delegated to its officers, and in municipal corporations to the different departments; those are generally electoral, legislative and administrative. The corporation has a right to its various powers to be exercised by its several departments or officers. Immediately preceding, and at the time of the passage of the act incorporating the city of Williamsburgh, the corporation of the village had the right to elect the keeper of the cell by the legal voters. That right, when the charter became operative, passed to the new city by a general term, and without any designated change. The obvious rule in such cases is that it passes with its *existing* incidents, and particularly with such of them as are essential to its exercise. The right of election was essential at the time, as there was not then any other way of choosing the officer. If such was the effect of the transfer of the right in question from the old to the new corporation, the virtual *continuance* of the power in the voters of the corporation to elect the officer granted by the act of 1848, saved it from destruction by the general repeal of that act, and of course the previously repealed provision on that subject contained in the act of 1836, was not revived.

If then any right in reference to this office was conferred upon the new corporation by the charter, it gave the power of election to the same department which it had immediately before. If no right at all was granted, it was not competent for the board of aldermen to make the appointment, and *quacamque via data* the relator has no title.

The motion for a mandamus is denied.

SUPREME COURT.

DORLON agt. LEWIS.

Where the service of a paper by one party has the effect of setting time to run against the opposite party, the time which thus begins to run shall be *twice* as long when the service is by *mail* (*Code*, § 412), as when made personally.

This rule is applicable to *appeals*. Where the right to appeal is limited to thirty days after "written notice," &c. the time for the adverse party to appeal begins to run from the time of the *service of notice;* and when the service of the notice is made by mail double the thirty days is allowed to bring the appeal.

On bringing an appeal from a judgment entered upon the report of referees to the general term, no security is necessary to be given, except for the purpose of staying proceedings.

On the substitution of attorneys, it is only necessary to serve the adverse attorney with a written notice of the fact.

Albany General Term, September 1852—PARKER, WRIGHT and HARRIS, *Justices. Motion to dismiss appeal.* Judgment was perfected in this action upon the report of a referee, on the 7th of October 1851, and *written notice* thereof was duly served on E. R. Peck, Esq. the defendant's attorney, by mail, on the same day. On the 10th *of October*, notice of the substitution of W. C. Benton, as attorney for the defendant, was served on the plaintiff's attorney. On the 7th of November, the defendant's attorney served upon the plaintiff's attorney and the clerk, notice of appeal to the general term from the judgment. The plaintiff's attorney moved to dismiss the appeal, and stated as the grounds of his motion, 1. That the appeal had not been made "within thirty days after written notice of the judgment." 2. That no undertaking upon the appeal had been filed. 3. That Benton had not been regularly substituted as attorney.

J. K. PORTER, *for Plaintiff.*

W. C. BENTON, *for Defendant.*

By the Court, HARRIS, Justice.—If the notice of the judgment had been personally served, the 6th of November would have been the last day for appealing, and, of course, the appeal would

have been one day too late. But the 412th section of the Code declares that "where service is by mail, it shall be double the time required in case of personal service." The language of this provision, though substantially the same as that of the 7th Rule in force at the time the Code was adopted, is not, perhaps, the most happy that might have been selected to express what was intended. To say that "service by mail" shall be "double time," conveys of itself no distinct idea to the mind. It is, to say the least, an awkward expression. Lapse of time forms no essential ingredient in the act of serving a paper. And yet it is the law that when the act is performed in a particular way, it, that is, the service, shall be double the time required when the act of serving the paper is performed in another manner.

But I believe this rule has always been construed to mean that where the service of a paper by one party, as, for example, a pleading, or a notice, has the effect of setting time to run against the opposite party, the time which thus begins to run shall be twice as long when the service is by mail, as when it is personal. Thus, the 143d section declares that a demurrer or answer must be served within twenty days after the service of the copy of the complaint. The time begins to run from the service. If, instead of serving the complaint personally, the plaintiff elects to serve it by mail, the time which thus begins to run against the defendant is *forty* days instead of the *twenty* days otherwise allowed. So, either party may give to the other a notice of trial. It must be *ten* days before the Court. But if he will serve his notice by mail, the time is doubled, and the notice must be served *twenty* days before the court.

The rule is applicable to appeals like that which is the subject of this motion. The right of appeal is limited to *thirty* days after "written notice," &c. The object of giving such notice is to terminate the right of appeal. The time for the adverse party to appeal begins to run from the time of the service of notice. If, therefore, the party giving the notice chooses to serve his notice by mail, as he may, he also gives the other party double the time he would have had if the service had been personal. The appeal in this case, therefore, was in time.

Nor are the other objections to the regularity of the appeal well

taken. The notice of substitution was sufficient. The plaintiff's attorney is mistaken in supposing he has a right to know how the substitution was effected. It was enough that he was served with a notice by one attorney that he had, in fact, been substituted in the place of the attorney who had before appeared. Nor was any security necessary to sustain the appeal. The chapter of the Code which authorizes an appeal in a case like this, does not require any security except for the purpose of staying proceedings.

The motion must be denied, and I think it should be with costs. The plaintiff's attorney gave notice, with the notice of his motion, that he would not ask for costs upon the motion, but this ought not to relieve him from the payment of the costs of resisting the motion. The defendant was obliged to appear to defend his appeal, and having succeeded, I think he should have the costs of such defence.

SUPREME COURT.

Cahoon agt. The Bank of Utica.

A cause of action for the recovery of money, can not be joined with one for specific relief, even though they arise out of the same state of facts.

Misjoinder and duplicity do not depend upon the fact that two or more causes of action are *well* stated; all but one may be defectively and insufficiently stated and yet the pleading be double.

(*This case agrees with Alger agt. Scoville*, 6 *How. Pr. R.* 131.)

Oswego General Term, May 1851. This action was brought by the assignees of S. W. Brown to compel the bank to pay over a surplus it had received on a mortgage, the property of Brown, pledged by him as collateral security, for notes of Brown & Rossiter, and to require the delivery of the notes to Brown's assignees.

The plaintiffs are general assignees of Stephen W. Brown, who died soon after the assignment and before the action was brought.

Brown in his life time was a mercantile copartner with one Rossiter. This firm was indebted to the Bank of Utica on its promissory notes for three thousand dollars. Brown, one of the firm, deposited with the bank, as collateral security for the payment of the notes at maturity, a mortgage, his own private property, for $3000, and some interest. The firm of Brown & Rossiter was dissolved by Rossiter's death, before the notes fell due. The notes were not paid at maturity, and the bank collected the entire amount of the mortgage, which exceeded that of the notes. This action was brought by Brown's assignees to recover the excess and to require the delivery of the notes to be made available against Rossiter's administrators, in the settlement of the partnership matters.

To the complaint setting forth these facts the defendant demurs, on the ground that the plaintiff can not have judgment for the excess in money, and for the delivery of the notes in the same action.

A. Loomis, *for Plaintiffs.*

Ward Hunt, *for Defendants.*

Gridley, Justice.—It is manifest that this is the union of a demand for money had and received, with a claim which, under the former practice, would have been the foundation of a bill in chancery, to compel the delivery of the notes. The two kinds of relief are *prayed for*, viz: *the payment of the money*, and the *delivery of the notes.*

1. The causes of action require different *trials.* The money demand is triable by jury, and the equity claim is triable by the court (see § 253 and 254). It is true that by section 253 it is provided that "whenever in an action for money only, or for *specific, real* or *personal property*, there shall be an issue of fact, it shall be tried by a jury. Now this last section relates to that kind of personal property which was formerly recovered in replevin and now forms the ground of the actions for the recovery of the possession of personal property, and has no reference to claims in equity; several of its provisions are incompatible with such a case, as for example, the fifth subdivision of section 207. For this reason there is a misjoinder.

2. But the 167th section declares what causes of action may be united, among which are,

1st. Classes of actions arising out of contract express or implied. If a note that is *functus officio* and paid up can be recovered at all, it is not by action on contract, but the action is one of tort (see Todd vs. Crookshank, 3 *Johns. Rep.* 432). Again, it is a sufficient objection that there is no contract laid in the complaint to redeliver the note.

2d. The seventh subdivision, which embraces claims against a trustee by virtue of a contract or by operation of law, is also relied on by plaintiffs. This was intended to provide for claims to enforce trusts, properly so called, and has no reference to such a case as this. But,

3d. The sixth subdivision embraces claims to *recover personal property with or without damages for the withholding thereof.* Now if the claim for the redelivery of the notes is embraced within this section, then it certainly excludes the claim for the money demand. The action is peculiar; the issues are different, and the trial, verdict and judgment, are all different in the two cases. The two causes of action can not be united either under the Code or the former practice. Moreover the last clause of this section provides that the causes of action united must all belong to one of these classes. The demurrer is allowed with costs.

The plaintiffs appealed from this decision, and the Supreme Court at a general term held before Justices PRATT, GRIDLEY, ALLEN and HUBBARD, affirmed the judgment. The following is the opinion of the court.

By the Court, ALLEN, Justice.—I think the judgment should be affirmed for the reasons stated in the opinion of the judge given upon pronouncing judgment. It may be said in answer to the ground taken by the plaintiffs on the appeal, to wit: that the complaint is not for two distinct causes of action, *for the reason* that the statement of the plaintiffs' claim in respect to the promissory note does not set forth sufficient facts to constitute a cause of action, so that in truth the only cause of action set forth is upon the money demand; that duplicity does not depend upon the fact that two or more causes of action or defences are

well stated. All but one may be defectively and insufficiently stated and yet the pleading be double. If the party sets forth and relies upon more than one cause of action or defence, his pleading will be double, and if they can not under the Code be united, his pleading will be bad upon demurrer (*Bacon's Abr. Pleas, K.;* Kennedy vs. Story, 10 *John. R.* 289; *Mansel on Demurrer*, 68; *citing id.* 176).

SUPREME COURT

TEN BROECK agt. THE HUDSON RIVER RAIL ROAD COMPANY.

Upon an appeal from the decision of a single judge to the general term, *no security* whatever is required. But if the party appealing desires a *stay of proceedings*, he must obtain an order for that purpose, or give the security prescribed by the 348th section of the Code (see Dorlon agt. Lewis, *ante page* 132).

Albany General Term, September 1852—PARKER, WRIGHT and HARRIS, *Justices. Security for costs of appeal.* Upon the trial of the action at the circuit the plaintiff was non-suited. Judgment for the costs of the action was perfected on the 14th of May 1852. On the 18th of the same month the plaintiff served a notice of appeal, in due form, pursuant to the 327th section of the Code. No undertaking, or other security for costs upon the appeal, was executed. The defendants moved to dismiss the appeal for the want of such security.

R. W. PECKHAM, *for Plaintiff.*

J. H. REYNOLDS, *for Defendants.*

By the Court, HARRIS, Justice.—The mode of making an appeal is prescribed by the 327th section of the Code. This section is found in that part of the Code which relates to "appeals in general," and is applicable to all appeals, in all courts. The 334th section relates *exclusively* to appeals to the Court of Appeals. It is found in the second chapter of the title relating to

that class of appeals. The first section in that chapter specifies the cases in which an appeal may be taken. The next section, which is the 334th, declares that before the appeal shall be effectual for any purpose, security for costs shall be given in the manner prescribed. The provisions of this section, as well as the succeeding sections in the same chapter, relate exclusively to the subject of the chapter, which is, "appeals to the Court of Appeals." They have no application to appeals brought under the three succeeding chapters of the title relating to other appeals. Each of these chapters contains its own provisions in relation to proceedings upon the appeals it authorizes to be brought.

When the appeal is from the decision of a single judge to the general term, no security whatever is required, but if the party appealing would have a stay of proceedings, he must obtain an order for that purpose, or give the security prescribed by the 348th section. The proceedings upon the appeal are, therefore, regular, and the motion must be denied; but as the question is new, it should be without costs.

SUPREME COURT.

DICKSON agt. MCELWAIN.

COSTS.

An order granting an *extra allowance* of costs (§ 308), and *costs of the motion*, is not the subject of review by *appeal*. Such allowance or disallowance, are matters resting entirely in the discretion of the judge who holds the court.

Albany General Term, September 1852—PARKER, WRIGHT, and HARRIS, *Justices*. *Appeal from an order granting an extra allowance of costs.* The action was brought upon a promissory note. Before the time for answering expired, an order enlarging the time to answer twenty days, was served. Before the time expired, an answer was served; to which the plaintiff replied, and he also served a notice of trial. Before the trial the defend-

ant served an amended answer, the effect of which was to throw the cause over the circuit. Before the next circuit, the defendant served on the plaintiff's attorneys an offer to let judgment be entered for the amount of the note. This offer was accepted, and upon this state of facts the plaintiff moved for an extra allowance, on the ground that the defence had been unreasonably or unfairly conducted. The court, at special term, made an allowance of ten per cent on the amount of the recovery, and also ten dollars for the costs of the motion. From this order the defendant appealed.

A. C. Geer, *for Plaintiff.*

N. Miller, *for Defendant.*

By the Court, Harris, Justice.—The making of an extra allowance, under the 308th section of the Code, is, from the necessity of the case, a matter resting in the discretion of the court, to which the application is made. It depends upon the question whether the trial has been difficult or extraordinary, or whether a prosecution or defence has been unreasonably or unfairly conducted. This question must, of course, be decided according to the impression which the facts and circumstances presented may make upon the mind of the judge who holds the court. The same facts and circumstances may make a very different impression upon other minds. There is no legal test by which, upon a review, the propriety of the decision can be determined. Though the order has the effect to increase the judgment against the unsuccessful party, it can not, from the very nature of the question, be the subject of review, upon appeal. The opinion of the judge who made the order is as likely to be right as the opinions of the judges who sat in review.

Nor can that part of the order which grants costs upon the motion be reversed upon appeal. The costs of a motion are always in the discretion of the court (*Code*, § 315). It has not been usual, at least so far as my own experience allows me to know, to allow costs upon such a motion. It is a matter of right for the successful party to present the case to the court for an extra allowance. It is equally a matter of right for the unsuccessful party to resist such application. The decision, upon the

application, rests very much in the discretion of the court; and in such cases, it is not usual to charge either party, whatever the result, with the costs of the motion. But, though we might have been better satisfied with the order, if no costs had been given upon the motion, it is not the subject of review, and the appeal must, therefore, be dismissed. I think, however, it should be without costs.

SUPREME COURT.

HOYT agt. CARTER.

Where a temporary injunction is allowed, and the complaint in the action is subsequently dismissed, the injunction *ipso facto* falls with it. Nor can an *appeal* restore the injunction. It can only be restored by a reversal of the judgment.

But where an appeal has been taken from such judgment of dismissal the plaintiff can apply to the court, on notice, to restrain the proceedings of the defendant until the decision upon the appeal. The court by its original power over the parties is authorized to grant such an order.

Albany Special Term, 1851. *Motion to vacate order.* The action was commenced in December 1849. The object of the suit was to restrain the defendant from diverting a water course. Upon the commencement of the suit, a temporary injunction was granted according to the prayer of the complaint. The cause was tried at the January circuit in Rensselaer, before Mr. Justice HARRIS, whose decision was filed on the 2d of August 1851. By this decision, it was determined that the plaintiff had not sustained his action, and that the complaint should be dismissed with costs. Judgment was entered upon the decision on the 4th day of September.

Upon an affidavit showing that the defendant had commenced operations for the purpose of diverting the stream, and that the plaintiff was about to appeal from the decision, Justice HARRIS, on the 6th day of September made an order so far modifying his decision as to allow the temporary injunction which had been

granted at the commencement of the trial, to stand and remain in force until the time for the plaintiff to appeal should have expired. At the time of making the application for the order, no notice that judgment had been entered had been served on the plaintiff's attorney. This motion was made to set aside the order of the 6th of September, with costs.

JOB PIERSON, *for Plaintiff.*

J. E. TAYLOR, *for Defendant.*

HARRIS, Justice.—This motion must be granted. The order was improperly made. The judge who tried the cause having made his decision, and the same having been filed, it could not be altered by him. It was like a verdict of a jury. If erroneous or defective it could only be corrected or amended upon application to the court. It had passed beyond the control of the judge. Judgment having been perfected upon the decision, the suit was thereby terminated, subject only to be reinstated by an appellate court. The complaint being dismissed, the injunction, *ipso facto*, fell with it (1 *Barb. Ch. Pr.* 644). Nor would an appeal restore the injunction. The complaint having been dismissed and the injunction thereby discharged, it could only be restored by a reversal of the judgment. The act sought to be restrained can only be prevented by an appeal to the original power of the court over the parties before it. Hart vs. The Mayor of Albany (3 *Paige*, 381), furnishes an example of the exercise of such original power. In that case, the chancellor had made an order dissolving the injunction. From that order an appeal to the court for the correction of errors had been taken. While the appeal was pending, the complainants presented a petition to the chancellor, asking that the defendants might be restrained from doing the act which had been prohibited by the injunction, until the decision of the appellate court. Upon the facts presented, the chancellor made an order to that effect. "The only reasonable ground of objection to such a proceeding" says the chancellor, "is, that it seems inconsistent for the court to make an order to restrain a party from proceeding, after it has, upon a full hearing of both parties, decided that he has both a legal and equitable right to proceed."

The order of the 6th of September must be vacated, with $10 costs of the motion, to abide the event of the suit, but without prejudice to the right of the plaintiff to apply to the court, upon notice, to restrain the proceedings of the defendant, until the decision upon the appeal, if any has been or shall be taken

SUPREME COURT

HINDS AND OTHERS agt. THE SCHENECTADY COUNTY MUTUAL INSURANCE COMPANY.

COSTS.

Now as before the Code, the travel fees of a witness, residing out of the state, must be estimated by the number of miles he travels from the boundary line of the state to the court.

Albany Special Term, 1852. *Motion for readjustment of costs.* The cause was tried at the Schoharie circuit, and, after the trial, the plaintiffs recovered a verdict. Upon the taxation of costs the plaintiffs claimed and were allowed for the travel of a witness from Somerville, in the state of Wisconsin, 1744 miles.

J. C. RAMSAY, *for Plaintiffs.*

P. POTTER, *for Defendants.*

HARRIS, Justice.—Under the fee bill of the Revised Statutes, when a witness came from another state, his traveling fees were estimated from the boundary line of the state, where he passed in coming to the place of trial (2 *R. S.* 642, § 33). The fee bill of 1840 changed the rate of compensation for traveling, and omits the clause in the former act requiring the fees to be estimated from the boundary line of the state. It is argued by the plaintiff's counsel, that this omission is evidence of legislative intention to change the rule. It is insisted that, in as much as by the present law a witness is entitled to four cents per mile going and returning, without restriction or qualification, the pro-

vision embraces travel out of the state as well as within. But I can not assent to this construction. I can not suppose that it was ever intended that the prevailing party in any suit, however important, should have the power of charging his adversary with the traveling fees of a witness brought from any part of the world, however remote.

Nichols vs. Doty (3 *Cow.* 352), has been referred to as an authority sustaining the charge. The only question in that case, as the report states, was whether a witness attending from another state should be allowed fees at the rate of 25 or 50 cents per day. It was held, and very properly, that he was to be regarded as a witness attending from a foreign county, and of course entitled to 50 cents a day.

In Howland vs. Lenox (4 *John.* 311), it was held, under the same fee bill, that where witnesses are brought from another state, their compensation is to be estimated by the distance between the place of trial and the boundary line of the state. The object of the legislature, it was well said by Mr. Justice GRIDLEY, in Clark agt. Staring (4 *How. Pr. R.* 243), was, to compensate a witness for traveling to and from the court which he was obliged, by the process of the court, to attend. The law should be construed with reference to this object, and a witness only allowed compensation for travel while within the jurisdiction of the court.

This motion must, therefore, be granted. The clerk, upon the readjustment, must disallow all fees for traveling out of this state. Neither party is to have costs upon this motion.

SUPREME COURT.

The People agt. The Metropolitan Bank.

A bank organized under the "act to authorize the business of banking," passed April 18th, 1838, have authority to receive, from depositors and dealers, uncurrent bank notes or bills of other banks, at a discount (the legal rate).

It seems, that there is no difference between receiving such bills on deposit at a discount, and *purchasing* them generally at a discount.

Quere? Whether if a bank is not one of *circulation*, but of discount and deposit only, it has the power to purchase or receive uncurrent bank bills at a discount. In other words, whether the organization in such instance is so complete as to confer banking powers?

At Chambers, July 1852. The defendant moved on the 3d inst. to vacate an injunction granted by Justice Watson, on 21st June last, restraining the Metropolitan Bank from buying or receiving on deposit, bank paper, at an amount less than purports to be due on its face, and from redeeming bank paper at less than par, except where it is the redemption agent of the bank issuing such paper.

At the same time the plaintiff having served an order to show cause, applied for a further injunction, restraining the defendant from transacting any longer any kind or description of banking business. Both motions were argued at the same time. The facts sufficiently appear in the opinion of the court to show what questions were decided.

L. S. Chatfield, *Att'y Gen'l*, N. Hill Jr. and Charles O'Conor, *for Plaintiff.*

Jas. L. Graham, Edward Sandford and Daniel Lord, *for Defendant.*

Parker, Justice.—I must leave entirely out of consideration the transactions of Edward Belknap, on whose complaint the information in this cause was filed, the relation of which, in detail, has occupied so much space in the defendant's affidavit. Whether or not this suit has grown out of a controversy between the brokers and the defendant. as is alleged, or however unworthy may have been the conduct or the motives of the complainant, in

deciding these motions, I can look only at the question whether the business transactions of the defendant are, or are not authorized by law.

Objections have been taken on both sides to the sufficiency of the pleadings. As I intimated to the counsel on the argument, I shall hold the allegations to be sufficiently specific. Either party desiring a more particular statement, could have resorted to a demurrer. But on this motion, as on a trial, the facts alleged are put in issue, and the objection that the allegations are too general is not tenable.

The defendant objects that Edward Belknap ought to have been joined as one of the plaintiffs, under § 434 of the Code, which provides that when an action shall be brought by the attorney general, on the relation or information of a person having an interest in the question, the name of such person shall be joined with the people as plaintiff. In this case, Edward Belknap made the affidavit annexed to the complaint, on which the injunction was allowed. He was probably the informant, on whose suggestion or solicitation the action was commenced; but he appears to have no interest in the result, except that the defendant interferes with his business as a broker, and particularly in compelling redemption of the bills of his Government Stock Bank at Ann Arbor. Every other broker in Wall street may have a similar and perhaps some of them an equal interest. But that is not an interest that makes it necessary to name him as one of the plaintiffs. Nor does the fact that he is one of the stockholders in the Metropolitan Bank affect this question. That interest is probably on the side of the defendant. The section of the Code above cited is applicable only to a case in which the action is substantially for the benefit of the relator, as when it is brought to establish a claim to a public office. Section 430 gives ample power to the attorney general to commence the suit in the name of the people only, on leave granted by the Supreme Court, or a judge thereof, which leave was duly obtained in this case.

Another objection made by the defendant's counsel is, that the subject is not a proper one for the exercise of equitable jurisdiction, and they cite the case of The Attorney General vs. The

Utica Insurance Company (2 *John. Ch. R.* 371), where, on an information filed by the attorney general, it was held that the Court of Chancery had no jurisdiction to restrain persons from carrying on the business of banking in violation of the statute, and an injunction for that purpose was refused. That case was decided in 1817, and afterwards by the 17th section of an act passed 21st April 1825, entitled "an act to prevent fraudulent bankruptcies by incorporated companies, to facilitate proceedings against them, and for other purposes," jurisdiction was conferred upon the court of Chancery, to restrain by injunction, on the application either of the attorney general or of any creditor of an incorporated bank, whenever it should be shown to the court that the bank was insolvent or had violated any of the provisions of its charter. Under that act the power was exercised (Attorney General vs. Bank of Chenango, *Hopk. Ch. R.* 598). This jurisdiction was retained by the Revised Statutes (2 *R. S. 2d ed.* 558, § 37), which provides that on a bill filed by the attorney general in the Court of Chancery, the chancellor shall have power to restrain by injunction any corporation from assuming or exercising any franchise, liberty or privilege, or transacting any business not allowed by the charter of such corporation. This section is now in force, except that the jurisdiction has been transferred from the Court of Chancery to this court; and it is under this section that the application for an injunction is made. It is not necessary in such case to show specifically that the commission of the act sought to be restrained *pendente lite* would produce injury to the plaintiff, under section 219 of the Code. In a suit by the people, the public wrong arising from a violation of the statute implies an injury during its continuance. If, therefore, it is shown that the defendant has assumed or exercised franchises, or transacted any business not allowed by its charter, this is a proper case for restraining it by injunction.

These motions come before me on complaint and answer, and on additional affidavits read on both sides. It is shown that the defendant is a banking association organized in April 1851, under the "act to authorize the business of banking," passed April 18, 1838, and the amendments thereto. The defendant's place

of business is in the city of New York, and its capital, originally $250,000, has been increased to two millions of dollars.

It is charged in the complaint, that the defendant has employed its capital in buying, at a price less than the sums payable on their faces respectively, the bills and notes intended for circulation as money, issued by banks, banking associations and individual bankers of this state and other states, which, at the place of such buying, are not current or redeemable at par, and disposing of the same by sale or return thereof for redemption to the bank, banking association or individual banker, issuing the same respectively. The defendant in its answer, admits that it has received from the depositors and dealers with the Metropolitan Bank, such bills and notes issued in this state at a discount or abatement by way of exchange, of not more than one fourth of one per cent, and at no greater discount or abatement, than that at which the banks and banking associations issuing such bills and notes were allowed by law to redeem or pay the same at the city of New York: and the defendant admits that it has received from depositors and dealers with the Metropolitan Bank, such bills and notes of other states, at a discount or abatement not exceeding the current, reasonable and true rate, or difference of exchange, between such bills and bills payable in the city of New York; and the defendant denies that it has bought or received said bills and notes either of this state or of other states, otherwise than as thus admitted.

No evidence is produced before me of any act of the defendant beyond what is thus admitted. There is then no controversy as to the fact that the defendant has been in the practice of receiving uncurrent bank notes at a discount; and the principal question presented for decision is as to the legality of such practice. This question is to be examined on the facts as admitted by the defendant, viz: that the defendant has been in the practice of receiving such bills or notes from its depositors and dealers, and that it has not otherwise purchased them. But I do not see how a right to so receive them, can be distinguished from the right to buy them generally at a discount. To receive them on deposit would probably be the manner in which the business would be transacted in either case; or at least, it might be such.

If the notes are received at a discount on deposit, the avails may be afterwards applied in payment of a note falling due at the same bank, or they may be drawn out on the check of the depositor. The notes may thus be received by the bank in payment of a debt, or they may be bought by the bank. How the avails are to be applied, may perhaps be uncertain at the time of the deposit. And the question after all, is whether a bank has the right to receive such uncurrent bank notes at a discount. If they may be so received, the avails may be disposed of by the bank in any lawful way. If, however, a legal distinction can be taken between buying such uncurrent notes at a discount and receiving them from depositors and dealers, the defendant is to have the benefit of it, as the facts admitted present only the latter case.

The defendant can exercise no powers except those expressly granted, or such as are incidental to the execution of the granted powers (Bank of Augusta vs. Early, 13 *Peters R.* 587). These powers are defined in the 18th section of the "act to authorize the business of banking," as follows: "Such association shall have power to carry on the business of banking, by discounting bills, notes and other evidences of debt, by receiving deposits, by buying and selling gold and silver bullion, foreign coins and bills of exchange, in the manner specified in their articles of association, for the purposes authorized by this act; by loaning money on real and personal security; and by exercising such incidental powers as shall be necessary to carry on such business." Then follows the authority to appoint and remove officers.

Is the receiving of uncurrent notes at a discount authorized under the power to "discount bills, notes and other evidences of debt?" It is said that that clause of the 18th section is only applicable to the discounting of paper not yet due, and that the discount intended is the taking out of the interest for the time the note has to run before due. But even in the case of discounting bank paper not due, the fair rate of exchange as well as the interest may be deducted, when the note is payable at a different place. Although uncurrent bank bills are due upon their face, yet they are payable at a distant place, and distance imports

time. So far, therefore, as the ability of the person taking them to realize the avails is concerned, they stand upon the same footing as a note not due. They are not available to the holder till he can have time to present them to the bank issuing them for payment, and the expense of transmitting them is equivalent to the exchange deducted on discounted bank paper payable at a distant place. Taking such uncurrent bank bills at less than their face, may be properly termed discounting them. It is taking them at a "discount." Such is the language employed in the complaint to denote such deduction. The word "discount," is also used in the same sense in the 8th section of the "act relating to the redemption of bank notes," passed May 4, 1840, and in the 4th section of the "act to amend the several acts relating to incorporated banks, banking associations and individual bankers," passed April 17, 1851. I think the transactions complained of were a discounting within the language and meaning of the statute.

There can be no doubt that the description of paper permitted to be discounted is broad enough to include bank bills. Even if a limited signification is to be given to "bills," as meaning bills of exchange, and to "notes," as meaning bank paper on time—to which I do not assent—the other clause, viz., "other evidences of debt," is too general to admit of question. A bank is authorized to discount any evidence of debt. There is nothing in the statute showing any intention to distinguish between paper on demand and paper on time. On the contrary, another statute on the subject of banking has declared that "the term 'evidence of debt' shall be construed to embrace every written instrument or security for the payment of money, importing on its face the existence of a debt, whether under seal or otherwise" (1 *R. S.* 3*d ed.* 731, § 67).

It weighs nothing in the argument to say that the purchase of uncurrent bank notes has generally been the business of bill brokers, any more than it would to argue that the discounting of bank paper on time was not legitimate banking business, because it had been generally done by individuals. The question of power depends entirely on the statute, under which, I think, banking associations are at liberty to receive uncurrent bank

bills at a discount. And such, it appears, has been the practical construction heretofore given to the statute. It is proved before me by the affidavits of persons long engaged in the business of banking, that on this subject the custom and practice of bankers has been uniform, and hitherto unquestioned. On this point no contradictory affidavits are produced.

The right to receive bank notes issued by a distant bank, at a discount which shall reduce them to their current value at the place where taken, seems indispensable to the transaction of business. Such notes must either be taken at their actual value, or they can not be taken at all. It is not expected they will be taken by banks at par, when they are worth less than par in market. It might, for a short time, best promote the circulation of the country banks thus to exclude their bills from banks in the city of New York; but it would tax heavily the commercial and industrial interests of society, and bring about a state of things not contemplated by our present system, and one that, to prevent great mischief, would demand an entire and immediate change of legislative policy.

The statutes regulating banking seem to imply that a bank may receive depreciated bank bills at their current value. The third section of the "act concerning foreign bank notes," passed May 7, 1839, prohibits any banking association from lending or paying out, for paper discounted or purchased by them, any *bank bill or note, or evidence of debt*, which is not received at par by the said association for debts due to the said association. This fairly implies that bank bills may be received below par. It is only the paying out that is prohibited—it being expected that the bank so taking them will return them to the bank issuing them, or to its agent, for redemption. It is here worthy of remark, that in the section last referred to, the words "*bill, note or evidence of debt*," are used to include uncurrent bank bills, in the same sense I have given them in my construction of the first clause of the eighteenth section of the general banking law of 1838, where the same words are used.

The statutes regulating the redemption of bank notes at a discount, by agencies established in New York and Albany or Troy, have no bearing upon the question I am discussing. These

statutes make it obligatory on each of the country banks to establish an agency, and authorize each to redeem through such agency at one-fourth of one per cent; and they forbid the purchase by any bank of its own notes at an amount less than what purports to be due thereon, at any other place than at and through such agency. The objects of these provisions were two fold: first, to prevent a depreciation of such bank bills below one-fourth of one per cent; and secondly, to prevent a bank making a profit out of a depreciation of its own paper. The statute in no way interferes with the purchase or receiving of such paper by other banks, at its current value, which, under the present system, can not be at a discount of more than one-fourth of one per cent.

It was charged in the complaint that the defendant had been engaged in redeeming country bank notes of this state for banks for which it was not the legally appointed redeeming agent. But that charge is fully denied in the answer, and is entirely unsupported by evidence. Redemption implies more than a mere purchase or receiving of the notes at a discount. It implies that it is done in behalf of, and, to some extent at least, for the benefit of the bank whose notes are so purchased or received; in other words, that it is an agent of the bank, though unauthorized by law for such purchase.

The question I have discussed is the important and controlling one in the controversy, out of which the action has arisen. Another point was however made in behalf of the plaintiff on the argument, viz: that the defendant is not a bank of circulation, and that no organization can be complete, so as to confer banking powers on an association, unless it is a bank of circulation as well as of discount and deposit. This point, if properly before me, presents two questions for determination; one of fact, viz: whether the defendant is a bank of circulation; and one of law, viz: whether it must necessarily be a bank of circulation to enable it to enjoy the franchise of banking. It is evident this point was not in contemplation by the parties when they prepared for these motions. Nothing is said on the subject in the pleadings, or in the affidavit served for the purpose of these motions. In an affidavit sworn to on the day of the argument, Edward Belknap states that within the last preceding twenty-four hours,

he had made inquiry at the bank department and learned that the defendant had not received from the comptroller or from the superintendent of the bank department any circulating notes. This affidavit not having been served on the defendant, can not be used on the application for a further injunction. It can only be used, if it all, in answer to the other motion to vacate the injunction now in force. And I am by no means certain that it would be available for that purpose; for the plaintiff ought not now to be permitted in answer to the application made to vacate the injunction, to make a new point entirely different from any thing suggested in the complaint or in the affidavit on which the injunction was allowed, and inconsistent with the grounds there taken. The injunction was allowed on the ground that the defendant, being a bank, was transacting other than banking business. The additional point now made is that the defendant is not a bank, and therefore has no right to transact banking business.

On the argument, however, an affidavit made on the same day by James McCall, the President of the Metropolitan Bank, was read, by which it was shown that immediately after the organization of that bank, the sum of one hundred thousand dollars was deposited by it with the Comptroller as a security for the circulating notes which should be issued by said bank, and that an order had been given by the bank to the head of the bank department for an issue of the bills of said bank, and that as soon as they could be got ready for such purpose, they would be put in circulation. It is not stated when the order was given, or what has been the cause of the delay.

By a statute passed April 12, 1848, amendatory of the act authorizing the business of banking, it was enacted that all banking associations shall be banks of discount and deposit, as well as of circulation. The evil this statute was designed to remedy, was not that banks of discount and deposit were established, which were not banks of circulation; but the contrary, viz: that banks of circulation only were in existence which had no banking house, and transacted no business of discount or deposit. The object of the statute was to break up the practice of issuing circulation merely for the purpose of redeeming at a discount that

afforded a profit. I do not myself see the evil of allowing the establishing of banks of discount and deposit only, which are not banks of circulation. The language of the statute may perhaps be broad enough to sustain the legal position taken by the plaintiff's counsel. If so, however, some fixed amount of circulation might be specified, so that a mere nominal circulation should not be deemed a compliance with the requisition.

But whatever may be the true construction of the statute, I can not feel warranted, on the facts before me, and on a mere chamber motion, to issue an injunction that shall entirely suspend all business operations of the defendant. I am not satisfied that even under the construction claimed, the defendant is amenable to any such severe penalty. It seems the requisite sum was deposited with the comptroller immediately on the organization of the bank, as security for its circulation, and that such circulation is now to be issued. If there has been a misapprehension of the law hitherto in this respect, from which no one has suffered, the correction can be readily made. The neglect does not vitiate the previous organization. It could in no way promote the public interests, but would be greatly to their detriment, to close the doors of the bank and wind up its affairs, because of the inadvertent omission of an act not jurisdictional, and which the defendant is ready to remedy, when those concerned in it would have the right at once to reorganize as a new institution. I shall not, therefore, award the injunction prayed for on this motion, but shall leave the plaintiff to claim such an injunction on the trial of the cause, when the facts can be more fully developed if, by amending the pleadings or otherwise, the question can be then properly raised.

The motion to vacate the injunction must be granted, and the motion for a further injunction denied.

SUPREME COURT.

HAVILAND agt. WHITE AND WHITE, Overseers, &c.

On a common law certiorari, to review a special proceeding, although the return may contain the evidence and all the decisions made during the progress of the trial or hearing below, the Supreme Court will only look into them so far as to determine whether the inferior tribunal has kept within its *jurisdiction* and proceeded *regularly*. Anderson vs. Prindle (23 *Wend.* 616), and Buck vs. Binninger (3 *Barb. S. C. R.* 391), commented upon.

It seems, that on a summary proceeding to compel a party to support a relative (1 *R. S.* 614), the Court of Sessions is not bound to hear evidence offered to show that the indigent person has a plausible ground for an action, by reason of his farm having been obtained from him by fraud.

Such a proceeding is within § 318 of the Code allowing costs in the Supreme Court, when brought there for review.

Dutchess General Term, October 1852—BARCULO, BROWN and STRONG, *Justices.* An application was made under the statute in relation to the "relief and support of indigent persons," by the defendants in error, as overseers of the poor, the Court of Sessions of the county of Dutchess, for an order requiring the plaintiff in error to relieve and support his father, Park Haviland, a poor person, and so old as to be unable to maintain himself by labor. A hearing was had before the Court of Sessions, witnesses examined, and an order made requiring the said George Haviland to pay the sum of one dollar and fifty cents a week for the support of his said father. George then sued out a common law certiorari to remove the proceedings into this court. The questions raised appear in the opinion of the court.

JOHN ENO, *Plaintiff in error.*

T. C. CAMPBELL, *for Defendants in error.*

By the Court, BARCULO, Justice.—On the hearing before the Court of Sessions, the overseers of the poor, by way of showing the poverty of Park Haviland, made proof that in 1848 he conveyed his farm to one Albert E. Haviland. In answer to this the counsel for said George Haviland offered to show "that said Park

Haviland was a lunatic at the time he executed the deed to Albert E. Haviland."

The evidence was objected to by counsel for the overseers, and rejected by the court; and this is the only error complained of before us.

The most obvious answer to the argument which calls upon this court to reverse the proceedings, for an error of the character set forth in this return, is, that a common law certiorari properly removes only the record or other entry in the nature of a record; and does not bring up for review the merits of the proceedings (The People vs. Mayor of New York, 2 *Hill*, 9). And although the return may contain the evidence and all the decisions made during the progress of the trial or hearing below; this court will only look into them so far as to determine whether the inferior tribunal has kept within its *jurisdiction*, and proceeded *regularly*. We can not review a decision as to the admission or rejection of evidence, or instructions given to a jury, or any other determination upon questions of fact or law, made by the court below, within its jurisdiction (Birdsall vs. Phillips, 17 *Wend.* 464; People vs. Judges of Dutchess, 23 *id.* 360; Prindle vs. Anderson, 19 *id*, 391).

I do not understand that this last case was *reversed* in the Court of Errors, as stated by Justice Willard in Buck vs. Binninger (3 *Barb. S. C. Rep.* 391). As I read the case in the Court of Errors (23 *Wend.* 616), the judgment of the Supreme Court was *affirmed* by a vote of *twelve* to *three*. It is true that the chancellor delivered an opinion adverse to that of the Supreme Court, upon the power of this court to go beyond questions of jurisdiction and regularity, on a certiorari, sued out under the statute authorizing summary proceedings to recover the possession of land; but whether that opinion was concurred in by the other members of the court does not appear. The judgment of the Supreme Court was affirmed, so far as the chancellor was concerned, on another ground. The same observations are applicable to the case of Niblo vs. Post's adm'rs (25 *Wend.* 280), in which the judgment of the Supreme Court was unanimously affirmed. It is not, however, necessary to sustain the decision of the Supreme Court in the case of Prindle vs. Anderson, to make

it an authority in this case, as the writ in that case was not a common law certiorari, but a statutory certiorari; and it was upon that ground that the chancellor differed from the Supreme Court. That case is here cited as containing a correct exposition of the law in relation to the province of a common law certiorari.

The difficulty under which counsel often labor, seems to be in applying the rule, and determining *what are questions of jurisdiction.* We frequently hear it urged that the inferior tribunal had not the jurisdiction to make certain decisions, or do certain acts; when nothing more is meant than that the court would not without erring, make the improper rulings and orders complained of. It is hardly necessary to say that such use of the word is wholly unauthorized.

The true principle may be illustrated and applied to the case before us thus: if the overseers had failed to give the notice required by the second section (1 *R. S.* 614) of the act, the sessions would not have acquired jurisdiction of the matter. Or if, after having obtained jurisdiction by due service of the preliminary notice, and an application regularly made, according to the statute, the court had proceeded to make an order, without having any proofs or allegations of the parties, as required by the act, they would have deviated from the course pointed out by the statute, and such irregularity could be reached by the writ of certiorari. Or if, having heard the parties regularly and fairly, the sessions had ordered the plaintiff in error to be committed to jail, until he paid or secured the moneys necessary for the support of his father, this usurpation of a power not conferred by statute, would vitiate, and cause the proceedings to be reversed.

But so long as the Court of Sessions obtained jurisdiction of the matter in conformity to the law; and as long as they kept within the limits of the statute in their proceedings and final order, their decision can not be reversed for any errors, whether of law or of fact, which occurred during the investigation. The rejection of the evidence, therefore, offered by the plaintiff in error, however erroneous it may have been upon general principles, can not be made the ground of disturbing these proceedings.

I do not mean to say that the ruling of the court below was erroneous. On the contrary, my impression is that it was correct,

and that it would have been improper on such summary proceedings to have undertaken to ascertain the competency of Park Haviland to execute a deed in 1848. If at the time of the investigation he was destitute of visible or known means of subsistence, it was sufficient to warrant the order made; although he might have had a plausible ground for an action, by reason of his farm having been obtained from him by fraud. But it is unnecessary to pursue this branch of the subject, as we design to rest our judgment upon the point already discussed.

A new question next arises, as to the matter of *costs*. It is quite clear that at common law costs were not allowed upon a *certiorari*. But it is contended that the Code has abolished that rule. Section 318 provides that, "when the decision of a court of inferior jurisdiction, in a special proceeding, shall be brought before the Supreme Court for review, such proceeding shall, for all the purposes of costs, be deemed an action at issue, on a question of law, from the time the same shall be brought into the Supreme Court, and costs thereon shall be awarded and collected in such manner as the court shall direct, according to the nature of the case." After a good deal of consideration and considerable hesitation, I have come to the conclusion (in which my brethren concur) that this section includes cases like the present. That this proceeding before the Court of Sessions is a *special* proceeding, within the meaning of the section, is manifest from the definition of that term given by the Code itself. It divides all remedies into "actions" and "special proceedings." It defines an action to be "an *ordinary* proceeding in a court of justice by which a party prosecutes another," &c.; and then declares that "*every other remedy* is a special proceeding" (§ 1, 2 and 3).

It is not only a special proceeding, but it is "brought before the Supreme Court for review." It is true that the court refuses to review the merits; but this court would review any errors apparent upon the record, and reverse the proceedings, if it could be shown that the court below had overstepped its powers. It is also true that the question is raised upon a return to a certiorari; that this is the only mode by which these and many other special proceedings, can be removed from courts of inferior

jurisdiction. There may be cases where the statute provides for an appeal, or some other mode of reviewing proceedings: but it is undeniable, that in most cases a certiorari alone will reach them. Hence we must conclude that the authors of the Code intended to include cases of this description; otherwise the section would not operate upon the great majority of cases brought to this court for review.

The proceedings below must, therefore, be affirmed with costs

SUPREME COURT.

Lovell agt. Clarke.

An application by petition, may be so framed as to embrace a discovery under the Code, and the production of papers, under the rules.

A defendant is entitled to an inspection and copy of an *assignment* of plaintiff's bond, declared on and made under an order of court, and also to a copy of the *order* to enable him to prepare for trial.

Dutchess Special Term, October 1852. The action is founded upon a bond which the complaint alleges to have been assigned to the plaintiff by "The New York Life Insurance Trust Company," by virtue of an order of the Supreme Court made on the second day of November 1850. The defendant now applies, by petition, for a discovery and production of the assignment and order to enable him to prepare for trial.

H. Hogeboom, *for Defendant.*

J. Lovell, *for Plaintiff.*

Barculo, Justice.—The application, although in the form of a petition, and conforming substantially to the rules, in fact seeks the discovery given by the Code. But I see no objection to the practice of so framing the application as to embrace both, which seems to have been done in the present case.

As to the *assignment*, there can be no doubt of the defendant's right to an inspection and copy. The suggestion made by plaint-

iff's counsel that he may rely on an assigment by mere delivery, is of but little force, in the absence of any affidavit; and especially when the penalty for not producing it is that the court "may exclude the *papers* from being given in evidence."

But it is contended that the plaintiff can not be required to discover the *order*, "because it is a record of the court and open to all." There would be more force in this argument, if all the orders were entered in one clerk's office; but as the orders are scattered over the whole state, I think it quite as reasonable to require the plaintiff to exhibit his copy, as to send the defendant's attorney to the various clerks' offices in search of it.

The plaintiff must, therefore, within three days after service of a copy of the order, give to the defendant an inspection and copy, or permission to take a copy of the order and assignment.

SUPREME COURT.

Miller agt. Gunn.

Where in an action for slander the plaintiff obtained verdict and judgment, from which the defendant appealed to the general term; and pending the appeal the defendant died; On a motion to continue the action in the name of the personal representatives of the deceased defendant (*Code*, § 121), *Held*, that although it was not necessary in respect to the pending appeal; yet that the personal representatives should be allowed to be made parties in reference to a further appeal if they desired.

Albany Special Term. Motion that action be continued in the name of the personal representatives of the defendant. The action was for slander. The plaintiffs in April 1851, obtained a verdict and perfected judgment thereon. From this judgment the defendant appealed to the general term, after perfecting his appeal, and before the cause had been argued upon the appeal the defendant died. His personal representatives applied for an order directing the action to be continued in their name.

E. P. Cowles, *for Plaintiff.*

K. Miller, *for representatives of Defendant.*

HARRIS, Justice.—The objection that there was no necessity for this motion, so far as the pending appeal was concerned, was well founded. The case is analagous to the writ of error at common law, where, if error had not been assigned, the writ abated by the death of the plaintiff in error; but if the death happened after error assigned, the cause proceeded. In such case, the court of review directed judgment to be entered upon its decision, as of a day anterior to the death of the party. So in this very case, since this motion was made, the appeal has been argued at a general term of this court, and the judgment affirmed. The court directed the judgment upon such affirmance to be entered, as of a day previous to the death of the defendant.

But it may be that the personal representatives may wish to appeal from the decision at the general term. How can they do this, without first becoming parties to the action? The 325th section of the Code declares that *any party aggrieved* may appeal, &c. I will not say that this provision is not broad enough to authorize an appeal by the personal representatives without their first being made parties to the suit. But it is certainly more *orderly* for such parties, before appealing, to have an order, under the 121st section, allowing the action to be continued in their name. I think the application is proper, and the motion should be granted.

SUPREME COURT

POMEROY agt. HULIN AND BEEBE.

Under the 385th section of the Code, a plaintiff has, *in all cases* of an offer of judgment by the defendant, ten days to elect, whether he will accept it or proceed to trial.

If a defendant desires to avail himself of the provisions of this section he must make his offer at such time that the plaintiff may also have the full benefit of the section; and if it is served so late that the cause is reached and tried before the expiration of the ten days, the rights of the parties are in all respects as if no offer had been made.

Onondaga General Term, October 1852—W. F. ALLEN, HUBBARD and PRATT, *Justices.* This was an appeal from an order at special term affirming the adjustment of the costs by the clerk of Cortland county. The action was upon a promissory note, and was defended by the defendants separately, and noticed for trial by all the parties at the circuit in Cortland, commencing on Monday the 26th day of July and was placed on the calendar of causes for trial. On Thursday before the circuit, the defendants' attorneys, by letter, requested the plaintiff's attorney to set the cause down for trial for a particular day in the latter part of the first week of the circuit, which was declined for the reason that the plaintiff had subpœnaed witnesses from Onondaga county, and among others a practicing physician, and it would not be proper to detain them after the cause should be reached. On Saturday the 24th of July, about 5 P. M., the defendants served upon the plaintiff's attorney an offer of judgment for the amount of the note and interest. On the 27th of July, the second day of the circuit, an inquest was taken and the clerk on the adjustment of the costs allowed the plaintiff the costs of the trial, and all the costs of the circuit. The plaintiff and his witnesses lived in Onondaga county, the former residing eighteen miles, and one of the latter twenty-nine miles from the residence of the plaintiff's attorney and the place of trial, and neither could have been reached by mail in time to prevent their attendance at the circuit on Monday.

R. RAYNER, *for Defendants*
L. R. MAYNARD, *for Plaintiff.*

By the Court, W. F. ALLEN, Justice.—We are of opinion that the clerk properly allowed to the plaintiff the expenses of the trial; that by the true construction of the 385th section of the Code of Procedure, the plaintiff has, in all cases of an offer of judgment by the defendant, ten days within which to elect whether he will accept the offer and take judgment in pursuance of it, or proceed to trial with the risk of being compelled to pay costs to the adverse party if he fail to obtain a more favorable judgment. Upon any other construction a party may be compelled to determine upon the instant, while a jury is being empannelled or while the trial of a cause is progressing, in a case requiring deliberation and the exercise of a sound judgment upon a cunning and doubtful offer, or an attorney may be compelled to act in the absence of his client, or a party may, as in this case, be met with an offer after he is compelled to attend court with his counsel and witnesses at great expense, for which he can receive no compensation. The provision was designed for cases in which some amount was confessedly due the plaintiff, but the precise amount was in dispute, and was not intended for cases like this, where the whole amount or nothing was due; it being supposed that in such cases the party would suffer judgment for want of an answer or litigate it to the end (*Report of Commissioners, page* 238). Hence the chapter is entitled "Offers to compromise," &c. Although as reported and originally adopted (*Code of* 1848, § 338), the provision was only applicable to actions arising on contract, it has been since extended by amendment to all actions, to which probably there is no good objection, if the party who is to act upon the offer is not deprived contrary to the evident intent of the section, of the time therein limited for his action. But if a party, or his counsel in his absence, can be compelled to act instanter upon an offer of judgment in a case where there may be a doubt whether it is better to accept the compromise than to contend for what may be supposed to be the strict right of the party, or where the judgment offered and which must in any event be entered is complicated

and requires consideration to determine whether it contains all proper provisions to protect all the rights and interests involved, it may work great injustice. The statute says the plaintiff may have ten days within which to accept or reject the offer. The defendants may, if we are not right in the construction of the act, limit that term to five minutes. A defendant may, without a shadow of defence, litigate until the cause is reached upon the calendar and then interpose an offer and leave the plaintiff to compensate his counsel for attending prepared for trial, and to bear his own expenses and all the expenses of the circuit except the witnesses fees. This would not be just, and we can not think it within the spirit or letter of the Code. The whole section read together is well calculated to prevent unnecessary litigation and secure fair compromises of disputed claims; but if the first clause is read by itself and construed literally, it tends directly to encourage sham and vexatious defences of just claims, and to increase the costs and perplexities of litigation. If a defendant, after interposing a defence to an action, desires to avail himself of the provisions of this section, he must make his offer at such time, that the plaintiff may also have the full benefit of the section, and if it is served so late that the cause is reached and tried before the expiration of the ten days, the rights of the parties are in all respects as if no offer had been made.

The order at special term is affirmed, but as the question is new no costs are given

SUPREME COURT.

In the matter of THE ALBANY NORTHERN RAIL ROAD COMPANY agt JOHN CRAMER 2D.

The Rail Road act, passed April 2, 1850, does not give the court power to set aside the report of commissioners of appraisement upon *motion*. And the Court can exercise no powers except such as are given by the act. It is only on *appeal* that the report can be reviewed, or set aside.

It seems, that the relation of cousin existing between the wife of one of the commissioners, and a stockholder in the company, is not such an affinity as to vitiate the report—no unfairness or injustice being complained of.

Saratoga Special Term, 1852. On the 11th of August last, Libbeus Booth and others were in pursuance of the 15th section of the act entitled " an act to authorize the formation of rail road corporations and to regulate the same, passed 2d April 1850," and upon the petition of the company, appointed commissioners by this court, to ascertain and appraise the compensation to be made to the owners or persons interested in the real estate described in the petition and proposed to be taken in the county of Saratoga. The said commissioners on the 22d day of September last, ascertained and appraised the compensation to be made to the above named John Cramer at six hundred dollars, who now moves to set aside that report, on the ground that the wife of the said Libbeus Booth, one of the commissioners, is a cousin of James Edwards, who is a stockholder in said company.

for Motion.

Opposed.

CADY, Justice.—It appears on the part of the said John Cramer, that neither he nor his counsel were aware of the affinity between Mr. Booth and Mr. Edwards at the time Mr. Booth was appointed a commissioner. It is not suggested on the part of Mr. Cramer that such affinity has operated prejudicially to him, and it appears from the affidavit of Mr. Booth, that his affinity to Mr. Edwards, and the fact that Mr. Edwards was a stockholder, never occurred to him until it was suggested to him by one of

Mr. Cramer's counsel, after the appraisal in his case was made. There is, therefore, no reason to believe that the affinity between Mr. Booth and Mr. Edwards, has in any way operated to the prejudice of Mr. Cramer. The only question therefore is whether the affinity between Mr. Booth and Mr. Edwards, a stockholder, has so vitiated the appraisement, that the law will not allow it to stand. In Eggleston vs. Smiley (17 *John.* 133), the justice and one of the jurors who tried the cause, were half uncles of the plaintiff's wife, and yet the Supreme Court affirmed the judgment in favor of the plaintiff.

In that case the court said, "there is nothing in the return that affords the least color for any pretence of unfairness or injustice in the proceedings before the justice." So in the case now under consideration, there is nothing in the report of the commissioners, or in the affidavits on the part of Mr. Cramer, "that affords the least color for any pretence of unfairness or injustice in the proceedings before the commissioners." In that case the court also said, "We think the objection to the justice is not well taken; to disqualify him from trying a cause the relation must be so near as to amount, of itself, to evidence of partiality and fraud." But there is another objection to the interference of the court in the manner asked for by Mr. Cramer. The court in performing the duties assigned to it, by the said act, can exercise no powers except such as are given by the act (20 *J. R.* 269; 2 *Hill*, 14). The act does not give the court power to set aside the report of commissioners upon motion. After the report is confirmed, in pursuance of the 17th section of the act, either party may, in pursuance of the 18th section appeal, and on the hearing of such appeal, the court may direct a new appraisal before the same or new commissioners, in its discretion. It is, I apprehend, only on appeal that the court has power to order a new appraisal, and appoint new commissioners; and for what cause the court will do this, must be determined on the appeal.

The motion is therefore denied, with ten dollars costs, to be paid by Mr. Cramer to the company.

SUPREME COURT.

Carter agt. Newbold.

On a common law certiorari, this court, although it should abstain from interfering with the decisions of inferior tribunals, in cases within their jurisdiction, *on questions of fact*, is bound to interpose to correct *mistakes of law* bearing upon the merits.

(*This seems to be adverse upon this point to Haviland agt. White, ante p.* 154, *and takes a different view of the decision in Anderson vs. Prindle*, 23 *Wend.* 616.)

The proceedings under the statute "Of forcible entries and detainers," (2 *R. S.* 507) are summary, and do not appropriately embrace the investigation of titles to real property, or the *right* to its present enjoyment.

Proof of a sufficient estate or right of possession is to be made to the judge before any process can be issued, but on the trial of the traverse before the second jury the complainant is only required to show, in addition to the forcible entry or detainer complained of, that he was peaceably in actual possession, or was in the constructive possession, at the time of the act complained of.

Nor is the defendant authorized to show or avail himself of any estate or right of possession in a stranger.

The court may in its discretion permit the defendant to move to set aside the inquisition, on the ground of the rejection of proper evidence before the jury which found it, after having traversed it before the county judge; and delay will not necessarily preclude him from obtaining relief.

N. F. Waring, *for Plaintiff.*

J. A. Lott, *for Defendant.*

S. B. Strong, Justice.—The plaintiff instituted a proceeding before the county judge under the statute relative to forcible entries and detainers. An inquisition was found and traversed, and then the proceeding was removed by certiorari into this court, where it is now pending. The defendant moves that the inquisition should be set aside, on the ground that evidence offered by him, and which should have been received before the jury by whom it was found, was rejected. The plaintiff objects that the motion has been made at too late a day, being upwards of a year after the return to the certiorari had been filed. The objection

would have been fatal if the motion had been founded on a mere irregularity in practice. But questions as to the admissiblity of evidence have reference to the merits, and in such cases delays do not necessarily preclude parties from obtaining relief. The action of the court is governed by the nature of the case, and where there is a discretion, its equities.

It is also objected by the plaintiff that in a certiorari at common law, or under a statute which does not in terms require any different action, this court is confined in its corrective power to the question of jurisdiction in the inferior tribunal. Such is to a very considerable extent, although not universally, the rule in England. But it has not been generally adopted in this state; and in Anderson vs. Prindle (23 *Wend.* 616), and Niblo vs. Post's administrators (25 *Wend.* 280), it was in effect repudiated by the Court for the correction of Errors. It is difficult to lay down any general rule on this subject, but it appears to me that although this court should abstain from interfering with the decisions of inferior tribunals, in cases within their jurisdiction *on questions of fact*, it is bound to interpose to correct *mistakes in the law* bearing upon the merits. It is of great importance that the rules of law, established for the good of all, should be uniformly applied in all our tribunals, whilst the community can be but little interested in the determination of a question of fact in a particular case. There are no questions more important than those which relate to the admissibility of evidence, and it is most essential to the satisfactory administration of justice that they should prevail with uniformity in all our courts.

The plaintiff also objects that it is too late for the defendant to move to set aside the inquisition after having traversed it before the county judge. Generally when a party answers in chief a pleading of his adversary, he is precluded from availing himself of any extrinsic objections to its validity. The rule is applicable to crminal as well as to civil cases, and of course to those which like that under consideration partake of the character of both classes (1 *Leach Crown Cases*, 11, 420; 1 *Chit. Cr. L.* 303). There is, however, a discretion in the court to relax the rule in a proper case, and that will be done where the objection is unknown to the party when he answers, or where he has not

then had an opportunity to urge it in an appropriate manner. The objection in this instance was known to the defendant when he traversed the inquisition, but as he was under the necessity of doing that within twenty four hours after it was found, he had not sufficient intermediate time to prepare the requisite papers for a motion to set it aside. He could, however, have made his motion promptly afterwards, and as he has not done so, and as he is not concluded on the merits by what has been done, but may yet introduce and avail himself of his evidence if it be competent, I do not think that it would be a judicious exercise of the discretion which the law gives me to set aside the inquisition at this late day.

But if the motion had been made in due season, it could not have been granted. It is founded upon the following passages extracted from the judge's return to the certiorari: "The defendant proposes to controvert the facts by which the complainant attempts to make out his estate or right of possession; and that he has not an estate of freehold or for term of years in the premises, then subsisting, or any other right to the possession thereof as will enable him to maintain the prosecution; also further in controverting his estate that it was subject to a right of way in favor of all the owners of lots on the Hicks map, holding them by conveyances in reference to and bounded by streets laid down on that map from and through the Messrs. Hicks, the original proprietors thereof, and also that it was an open street not only dedicated but actually thrown out as a public street by the owners at a period, and some time prior to the possession of the complainant, and within three years and a half; which propositions of the defendant were objected to by the counsel for the complainant and I (the county judge) then and there refused to allow the defendant to introduce such testimony, to which decision the counsel for the defendant then and there excepted." The defendant did not attempt to prove that the plaintiff was not in the actual and peaceable possession of the land when he was forcibly put out. The object of the testimony which was offered and rejected was to controvert the plaintiff's title, and his right of possession. In my opinion neither was a proper subject for the investigation of the jury by whom the inquisition was found.

The statute no doubt designed and provided for those summary proceedings for the benefit of such occupants only as "have an estate of freehold, or for term of years in the premises, subsisting at the time, or some other right to the possession thereof." But the proof of such estate, or right of possession, is to be made to the judge when the complaint is preferred, and before any process can be issued (2 *R. S.* 508, § 3). The statute no where confers upon the jury of inquiry the power to investigate the title or right of possession of either party. The fifth section provides that the jury shall proceed to make inquiry into the forcible entry, or the forcible holding complained of, and may examine witnesses on oath to be administered by the judge. The examination of witnesses must, of course, be limited to the appropriate subject of investigation, and those can be only such as are specified in the act. The proceedings are altogether statutory, and neither judge nor jury has any other power than what the act confers. On the trial of the traverse before the second jury, when the inquiry must be at least coextensive, the complainant is only required to show in addition to the forcible entry or detainer complained of, that he was peaceably in *actual* possession at the time of a forcible entry, or was in the constructive possession at the time of "a forcible holding out;" and the traverser may show in his defence that he or his ancestor, or those whose interest he claims, have been in quiet possession for the space of three whole years next before the inquisition found, and that his interest therein is not then ended; and it is declared that such showing shall be a bar to the prosecution (§ 11). No right is conferred upon the defendant to prove any interest in himself unless he has been in such possession, nor to assail the right of the plaintiff unless his possession is merely constructive. Neither is he authorized to show or avail himself of any estate or right of possession in a stranger. The statute so far follows the common law rule as to furnish no justification or defence to any one who, without any estate or right of possession in himself, disturbs the peaceable possession of another, whether that be rightful or not. We have but few decisions on the subject of forcible entries and detainers, and particularly since the change created by the Revised Statutes. The opinion of the Supreme Court in the case

of The People vs. Van Nostrand (9 *Wend.* 50), is in accordance with the views which I have expressed. In that it is said that the only defence allowed to the defendant on the traverse is the denial of the forcible entry or forcible holding out, or the possession by the defendant or his ancestor, specified in the 11th section. And it is also laid down that possession (by the plaintiff) is sufficient, and that the defendant is not at liberty to rebut the inference drawn from the possession by showing the kind of estate which the complainant has in the premises. I am satisfied that it was not the design of the legislature to cast upon either jury in these proceedings, which to have any benign effect must be summary, the burden of investigating titles to real property, or to the right to its present enjoyment. Investigations upon those subjects are often, and indeed generally very elaborate and would be very inappropriate in cases where the only result must be a continuance or change of the mere possession.

A serious objection to the defendant's offer, to which I have incidentally alluded, is that it does not include any tender of evidence to prove a right of possession in himself, or, if there is a private way over the premises, that he has a right to use it, or that if there has been a dedication of such premises as a public highway, he has a right to open it. Without such right he is a mere stranger or volunteer; and the statute no where allows a defence to any one who violently turns another out of possession, except where he acts in support of interests appertaining or confided to himself.

The motion must be denied.

SUPREME COURT

SHERMAN AND COLLINS agt. BUSHNELL AND BUSHNELL.

CASEWELL, CASEWELL AND McKENZIE agt. SAME.

An answer which denies on oath, that the defendant "has any knowledge or information sufficient to form a belief, that the payee endorsed and delivered the note to the plaintiff," intended to meet a corresponding allegation in the complaint, *is a material part of the issue;* and comes within one of the alternatives allowed by § 149 of the Code.

It can not be stricken out as *sham*, because it is sworn to, and there is no new matter set up. And besides, it is a mere denial of an allegation of the complaint, in a form allowed by the Code.

New York General Term, October 1852—*Justices* EDWARDS, MITCHELL and ROOSEVELT. *Appeals from the orders of New York Special Term of August* 30, 1852, *striking out the answers of Harry Bushnell as sham, &c.* The complaints were on two notes made by Harry Bushnell, and endorsed by Geo. W. Bushnell. The defendant Harry Bushnell appeared and answered in each action, and denied that he had "any knowledge or information sufficient to form a belief" in respect to each allegation in said complaints, except as to the making of said notes.

On the pleadings and on the affidavits of the plaintiffs, showing for what the notes were given, motions were made in each cause and orders granted striking out said answers as sham, frivolous and irrelevant. The defendant appealed. The pleadings were verified.

JOHN DEAN, *for Appellant.*

C. ELLIS, *for Respondent.*

By the Court, MITCHELL, Justice.—The defendant, H. Bushnell, by his answer substantially admits that he made the note sued on, but denies that he has any knowledge or information sufficient to form a belief that the payee endorsed and delivered it to the plaintiffs. This is a material part of the issue. The plaintiffs obtained an order at the special term striking out the answer as sham, because affidavits were produced which made it very pro-

bable that defendant did know that the payee had so endorsed it. On appeal the plaintiffs contend that a defendant must answer as of his knowledge as to matters which it is presumed are within his knowledge. This is to overturn the privilege given him by the Code, which is in the alternative to deny the plaintiff's allegation or to deny "any knowledge or information thereof, sufficient to form a belief" (*Code*, § 149). If a different rule has been adopted in courts, other than the Supreme Court, it seems too clearly at variance with the law to be followed. Next, it is said the answer is sham, because it is to be inferred that it is false, and known to the defendant to be so. That is a part and only part of the definition of a sham answer; it omits the essential part of the definition, viz: that the answer sets up new matter. Accordingly, under the old system the general issue, which was a mere negation, was never treated as sham, but only those pleas which had no foundation in the facts of the case, but only in the ingenuity and imagination of the attorney (Broome Co. Bank vs. Lewis, 18 *Wend.* 566). It was this ingenuity and invention which was the evil to be corrected, and which could not be alleged against a mere denial, whether of one or all of the allegations in the complaint. Ingenuity and invention can be predicated only of new matter introduced. The word sham may apply to any thing active, not to mere denial: a sham fight, in which the action was all on one side, would not be more extraordinary than a sham answer which merely puts in issue the allegation of the plaintiff without setting up new matter. The term, "sham plea" was well known when the Code was adopted (instances of those pleas may be found in 1 *Chitty Pl.* 575); and it had obtained a precise legal meaning, applicable only to pleas of new matter; and in that known and established sense it was used in the Code. This answer was also sworn to; for that reason also, as was held at the general term of this court in Mier vs. Cartlidge (8 *Barb. S. C. Rep.* 75), it ought not to be regarded as sham.

The order appealed from is reversed, without costs.

SUPREME COURT.

In the matter of the application of BENJAMIN WELCH JR. agt. JAMES M. COOK.

To give a justice of this court jurisdiction to grant an order, under the statute (1 *R. S.* 124, § 50, 51, 52, 53), to compel the delivery over of the books and papers of a public office, the applicant must show a *regular judgment of ouster* in his favor.

In an action brought by the Attorney General in the name of the People to try the right to a public office, his written stipulation made in the progress of the cause, binds the individual claiming the right to such office equally as if named a party, with the People.

m

This is an application on the part of Benjamin Welch Jr. for an order against James M. Cook, to compel the said Cook to deliver over to him, the said Welch, the books and papers in the custody of the said Cook, belonging and appertaining to the office of treasurer of the state of New York.

The application is founded upon a petition of the said Welch, duly verified, setting forth, that at a general election held in this state on the 4th day of November 1851, he was duly elected treasurer of the state of New York; but that, notwithstanding such election, the certificate of the state canvassers was given to James M. Cook, who entered upon the duties of said office, and continues to exercise the same. That on or about the 1st day of January 1852, the People of this state, by L. S. Chatfield, their attorney general, commenced an action in the Supreme Court in the nature of a *quo warranto*, against the said Cook, founded on the facts aforesaid. That the venue in said action was laid in Tompkins county; and such proceedings were thereupon had, that on the 30th day of September 1852, judgment was rendered and duly perfected in said action, in favor of the said people, of which the following is a copy:

SUPREME COURT—The People of the State of New York vs. James M. Cook. Judgment September 30, 1852.

This cause having been tried on the issues of fact joined therein, and the jury having found a verdict in favor of the plaintiffs, and

that the defendant, James M. Cook, is guilty of usurping and intruding into, and unlawfully holding and exercising the office of treasurer of the state of New York, and that Benjamin Welch Jr. is rightfully entitled to the said office of treasurer of the state of New York, and to all the rights, franchises and emoluments thereof, and has been so entitled since the first day of January 1852. Now, on motion of Levi S. Chatfield, attorney-general of said state, it is adjudged that the said defendant, James M. Cook, is guilty of usurping, intruding into, and unlawfully holding and exercising the said office of treasurer of said state, and the rights and franchises appertaining thereto, since the first day of January 1852, and still does so unlawfully hold and exercise the same, and that he be, and is hereby excluded, ousted, and removed therefrom.

And it is further adjudged that the said Benjamin Welch Jr. is entitled to the said office of treasurer of the state of New York, and the rights, franchises, fees and emoluments thereof, and that he has been so entitled since the said first day of January 1852.

And it is further adjudged by the said court that the plaintiffs recover of the defendant the sum of twelve hundred eighty-two dollars and ninety-nine cents, costs and disbursements.

HORACE MACK, *Clerk.*

State of New York, Tompkins County, Clerk's Office, ss: I hereby certify that I have compared the foregoing copy of a judgment with the original record of judgment now remaining on file in this office, and with the record thereof, and that the same is a correct transcript therefrom, and of the whole of such original records.

In testimony whereof, I have hereunto set my hand and affixed [L. S.] the seal of the said county, at Ithaca, this first day of October, A. D. 1852.

EZRA WEAVER, *Dep'y Clerk, Clerk absent.*

The petition further states that the said Welch has taken the oath of office prescribed by law, and filed his bond, approved by the lieutenant governor and speaker of the house of assembly, according to the statute; and that on the 6th day of October 1852, he served on the said Cook a copy of said judgment, and demanded of him the books and papers in his custody as treasurer

of the state of New York, in any way appertaining to said office; and that the said Cook refused to deliver the same to him.

The said Cook, by affidavit, denied on his information and belief, that the said Welch was duly elected such treasurer at the election held on the said 4th day of November, 1851, and claimed that he had received the certificate of the state canvassers: and that it appeared by the official canvass of the said election that he had received a majority of votes (setting forth the amount given for him, and those given for Welch); that he had been declared duly elected; had taken the oath, and given the bond prescribed by law, and entered on the duties of the office, which he still continued to execute. That on the 6th day of October 1852, a copy of the paper (purporting to be a copy of judgment, as set forth in the petition of the said Welch) was served upon him, which was the only copy of a paper served upon him, except the petition of the said Welch, and the certificate and order to show cause. That thereupon, his attorneys, Learned and Wilson, in pursuance of former directions of this deponent, proceeded to take and complete the necessary steps to appeal to the Court of Appeals, from the judgment set forth in the petition; and that the said petition is the only notice of said judgment which has been served upon him.

William L. Learned, his attorney, swears that he was one of his attorneys in the action wherein the People were plaintiffs, and the said Cook defendant; and in which the alleged judgment was entered; that at the trial of the said action at the March Tompkins circuit, a stipulation was made and signed by the attorneys of the respective parties, of which the following is a copy, to wit:

"Supreme Court, Tompkins circuit, March 1852. The People of the State of New York against James M. Cook.

The presiding judge on the trial of this cause having directed a verdict for the plaintiffs therein, which the jury rendered in pursuance of such direction: It is hereby stipulated and agreed, that the defendant shall have thirty days in which to make and serve a bill of exceptions therein; and that the plaintiffs have the same time to make and serve amendments thereto, and that all proceedings on the part of the plaintiff shall be stayed until

the decision of the Supreme Court shall be given upon the said bill of exceptions and the points raised therein. And it is further stipulated, that after judgment shall be perfected in said cause, and after said decision shall be made by said court, no execution or other proceeding shall be taken or had by the party in whose favor the decision shall be, until after the expiration of ten days from and after notice of said judgment being perfected shall be served on such defendant.

L. S. CHATFIELD, *Att'y Gen'l, for Pl'ff.*
LEARNED & WILSON, *Att'ys for Def't*

March 16, 1852.

That on the 6th day of October 1852, he sent by mail to the clerk of Tompkins county, an undertaking and notice of appeal in this case; and that on the 7th day of October 1852, he caused a copy of the said undertaking, with the accompanying affidavit of justification and acknowledgment, and the notice of appeal to be served on L. S. Chatfield, attorney-general for said plaintiffs in this action.

The deponent further stated in his affidavit, that, at the trial of the cause in Tompkins county, the court directed the jury to find a general verdict for the plaintiff; and ordered that the bill of exceptions made up in the cause by the defendant, be heard in the first instance at the general term; and that this was the only verdict given in the said action. That, after the trial of the said action, a bill of exceptions was taken and argued at the general term of the Supreme Court held in Delaware county; and that no judgment was given in said action until the decision of said bill of exceptions, at a general term of the Supreme Court in Cortland county, on the 14th day of September 1852; on which day a rule for judgment was entered (as deponent is informed by a certified copy thereof, and believes), and the same is not the judgment of which a copy has been served on the defendant, and contains no judgment of ouster. The deponent further says, that there can be no authority for entering the judgment dated September 30th, 1852, other than said verdict and rule.

L. S. CHATFIELD, *for Petitioner Welch.*
JOHN C. SPENCER, *for Cook.*

WATSON, Justice.—The writ of *quo warranto*, formerly in use to try the right of any person to an office to which another claimed he was not entitled, has been abolished, and the remedy by civil action substituted in its place (*Code of* 1851, § 428). In this action, the attorney-general, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightfully entitled to the office, with the statement of his right thereto; and may arrest the person who has received the fees and emoluments of the office, and hold him to bail, with the same effect, and subject to the same rights and liabilities as in other civil actions (*Code*, § 435). Such were the proceedings in this case, and the judgment alleged to have been entered, was that the said Welch was entitled to the office, and that the said Cook was an intruder into the same. Upon the rendition of such a judgment, the provision of the Code is as follows:

"If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he shall be entitled, after taking the oath of office, and executing such official bond as may be required by law, to take upon himself the execution of the office; and it shall be his duty, imme diately thereafter, to demand of the defendant in the action, all the books and papers in his custody, or within his power, belonging to the office, from which he shall have been excluded.

"If the defendant shall refuse or neglect to deliver over such books or papers pursuant to the demand, he shall be deemed guilty of a misdemeanor; and the same proceedings shall be had, and with the same effect, to compel the delivery of such books and papers, as are prescribed in article five, title six, chapter six of the first part of the Revised Statutes."

The Revised Statutes give to the party in whose favor judgment has been rendered, the right to make complaint to the chancellor, any justice of the Supreme Court, any circuit judge, or the first judge of the county where the person so refusing shall reside; and if he shall be satisfied from the testimony offered, that any such books or papers are withheld, he shall grant an order, directing such person so refusing, to show cause before him, within some short and reasonable time, why he should not

be compelled to deliver the same. If upon an inquiry before such officer the person charged with withholding such books or papers, shall make affidavit that he has truly delivered over to his successor, all such books or papers in his custody, or appertaining to his office, within his knowledge, all further proceedings before such officer shall cease; and the person complained against shall be discharged. If he does not make such oath, then the officer shall by warrant, commit such person to the jail of the county, there to remain until he shall deliver such books and papers, or be otherwise discharged according to law (1 *R. S. p.* 124, § 50, 51, 52 and 53).

The first objection taken by the defendant to the proceedings is, to the jurisdiction of the court, on two grounds: one, that there is no evidence of any legal judgment in favor of the said Welch, that he is entitled to the office which he claims, or that the defendant is an intruder in the same, and should be ousted therefrom. As no proceedings to obtain the books and papers belonging to or appertaining to the treasurer's office can be instituted before me, unless a judgment has been rendered upon the right of the person alleged to be entitled thereto, and in his favor, it is important to look into the evidence of the existence of the judgment upon which the said Welch claims to be entitled to the books and papers belonging to the said office. He states in his petition, that "judgment was rendered and duly perfected in said action, on the 30th day of September 1852." In what court, or whether under the direction of a single judge at a special term, or at a general term, he does not state. Were there no affidavits to contradict this statement, I might presume, or take it for granted, that it was entered in some court authorized to have it entered therein. The copy of the judgment alleged to have been entered, as set forth in the petition, does not state where the cause was tried; before what court; or that any court ever authorized a judgment to be entered on the finding of the jury. So far as the petition goes, I am led to infer that the judgment was entered at once on the finding of the jury. But the affidavits of the defendant show that the cause was tried in the county of Tompkins; that the justice who tried it directed the jury to find a verdict for the plaintiff; and ordered that the bill of exceptions

to be made up in the cause, be heard in the first instance at the general term.

The judgment upon the finding of the jury would not, in such a case, be correctly entered, until the general term of the Supreme Court had decided upon the bill of exceptions; and the judgment record, set out in the plaintiffs' petition, does not show that the bill of exceptions had ever been decided at the general term. But the defendant's affidavits go further and show that a decision was given upon the said bill of exceptions at a general term of the Supreme Court, in the county of Cortland, on the 14th day of September 1852; and that the same is not the judgment with a copy of which the defendant had been served, *and contains no judgment of ouster.* If this be so, then I have no jurisdiction in the matter. No proceedings to obtain the books and papers can be instituted, until a judgment of ouster has been regularly entered, against the person executing the duties of the office. It is said, on the part of the petitioner, that I have no right to inquire into the *regularity* of the judgment entered in favor of the petitioner. I have no proof before me of any judgment entered in his favor, showing his right to the office which he claims, except what his affidavit discloses; and it seems to me that if he can prove the existence of a judgment by affidavit, the party against whom he moves has an equal right to contradict its existence by affidavit. If the petitioner, then, relies upon the judgment record set forth in his petition, he is met with the objection interposed by the defendant, that

"Judgment upon an issue of law, not tried at a general term, or an issue of fact, or upon confession, or upon failure to answer (except where the clerk is authorized to enter the same by the first subdivision of section 246, and by section 284), shall in the first instance *be entered upon the direction of a single judge,* or report of referees, subject to review at the general term, on demand of either party as herein provided" (*Code,* § 278), or that "appeals in the Supreme Court shall be heard at a general term, either in the district embracing the county where the judgment *or order appealed from was entered,* or in a county adjoining that county; except, that where the judgment or order was en-

tered in the city and county of New York, the appeal shall be heard in the first district" (§ 346).

"Judgment upon the appeal shall be entered and docketed with the clerk in whose office the judgment roll is filed. When the appeal is heard in a county other than that where the judgment roll is filed, or is not from a judgment of a county court, the judgment upon the appeal shall be certified to the clerk with whom the roll is filed, to be there entered and docketed." There is nothing in the petition to show, that the judgment was entered under the direction of a single judge or at a general term. There is not even a caption to the record, to indicate whether it was entered at a general or a special term, and no certified judgment from the clerk of Cortland county; and yet in a case where so stringent a remedy is asked for, as to imprison the defendant, if he refuses to deliver the books and papers pertaining to his office, I am called upon to hold that the judgment upon which the petitioner moves is regular in the face of all these irregularities, or I might say illegalities.

Another objection of a grave character, to my jurisdiction is interposed: that the attorney-general, who acted for the people, whilst this cause was proceeding to try the rights of the contesting parties to this office, stipulated that "all proceedings on the part of the plaintiff shall be stayed, until the decision of the Supreme Court upon the bill of exceptions should be given, and judgment perfected thereon, and that no execution, *or other proceeding* shall be taken or had, *by the party in whose favor the decision shall be*, until after the expiration of ten days *from and after notice of said judgment being perfected shall be served on such defendant.*" This stipulation was not denied on the part of the attorney-general on the argument; but he insisted, that notwithstanding his stipulation, he could not stipulate away the rights of Mr. Welch; that in that action he represented the people, but that now he was counsel for Mr. Welch. If I understand the statute, which I have quoted in the former part of this opinion, he had a right to include Mr. Welch (who claimed the right to the office of treasurer), in the same action with Mr. Cook, whom it was alleged, *usurped* the office. The judgment

record, in the same breath that it declares that Mr. Cook *usurps* the office, also asserts that Mr. Welch is *entitled* to it, and in this action the attorney-general represented *both parties*. He stipulated, therefore (among other things), for "*the party in whose favor judgment was rendered*," "that no execution *or other proceedings should be taken or had*, until after the expiration of ten days *from and after* notice of said judgment being perfected, should be served on the defendant." He now moves on the part of Mr. Welch, the party in whose favor judgment was rendered, in a proceeding taken upon that judgment, to compel Mr. Cook to deliver over to him the books and papers belonging to the office of treasurer of the state, before the ten days have expired. This I consider a violation of that stipulation. The attorney-general having charge of that action, both on the part of the People, and on the part of the contestant, Mr. Welch, had a right to stipulate for the parties, whom he represented, how long the judgment to be pronounced by the Supreme Court upon the finding of the jury, should remain inoperative; and for what length of time the party, in whose favor it was rendered, should be precluded from taking any proceedings upon it. Having done so, and the party in whose favor judgment was rendered, having moved before ten days have expired (whether by the attorney-general as his counsel, or by any other counsel), he has taken these proceedings before he was warranted by the stipulation, and in consequence thereof, I have no jurisdiction in the case. This view of the case will save me the necessity of examining the points whether the appeal to the Court of Appeals by the defendant, suspends the operation of the judgment, so that no proceedings can be had thereon.

The motion to compel the defendant to deliver the books and papers to Mr. Welch, must be denied with $10 costs; but without prejudice to Mr. Welch, and with leave to renew the motion on new papers.

SUPREME COURT

WEVER Appellant agt. MARVIN Respondent

It seems, that appeals from all decrees or sentences of surrogates should be first heard at *general term*.

Quere? Whether, under the statute, the power exists to hear such appeals by a justice at special term?

A petition of a creditor for an order of a surrogate requiring executors to render an account of their proceedings, is sufficient, if it state "that the applicant is a creditor of the deceased (naming him), and as such has claims against the estate of said deceased." The statute authorizing such application has reference exclusively to the *personal* estate of the deceased; it is not, therefore, absolutely necessary to specify, in terms, that the applicant has claims against the *personal* estate.

An individual named as executor in the will, but not in the letters testamentary, and never having appeared in the surrogate court and qualified, is by statute (2 *R. S.* 71, § 15), superseded, and has no power or authority whatever as executor.

The surrogate can not make an order that such an individual account as executor, although he may in some respects have acted as such. It is a question of *power*.

Where it appears that such an individual has in some matters, in relation to the estate acted as an executor, such acts can not operate as an estoppel to the allegation of non executor, so as to give the surrogate power to call him to an account. The doctrine of estoppel *in pais* does not apply in such a case.

Albany Special Term, August 1852. *Appeal from part of an order or sentence of the surrogate of the county of Albany.* On the 17th March 1852, Nicholas Wever presented his petition to the surrogate of the county of Albany, praying that an order might be granted that Francis I. Marvin and Uriah Marvin render an account of their proceedings as executors of the last will and testament of Uriah Marvin, deceased.

The petition stated that Wever "is a creditor of Uriah Marvin, late of the city of Albany, deceased, and as such has claims against the estate of said deceased." It gave no description of his demands, or whether the claim was against the personal or real estate of the deceased.

On the 4th May 1852, the parties appeared before the surrogate, and Wever called for the account of the Marvins as executors,

which they declined to produce, and thereupon Wever moved that an attachment issue against them. This was objected to on the part of the Marvins on the ground that they deny that Wever is a creditor, or has any demand against the estate; which objection was overruled by the surrogate.

It was further objected to the issuing of an attachment against Uriah Marvin on the ground that the record of the surrogate did not show that letters testamentary had issued to the said Uriah; and as proof of this, presented the book of record of letters testamentary It appeared affirmatively from the record that letters testamentary had been issued only to Francis I. Marvin, one of the executors named in the will of the deceased, and these issued on the 21st December 1848.

In opposition to this objection, Wever claimed that Uriah Marvin, having acted as executor, is by such act estopped from denying that he is such executor; and to maintain this point he presented in evidence from the files of the surrogate's court the copy notice of appraisal of the personal estate, and the affidavit annexed to the inventory of said estate. The notice of appraisal purported to be signed by Uriah Marvin, as executor, and also the affidavit annexed to the inventory.

On the 8th June 1852, the surrogate made a decree or sentence, as follows:

"On reading and filing proof of due and personal service of citation on Francis I. Marvin, one of the executors above named, and like service upon Uriah Marvin having been admitted, and upon application for an attachment against the said Francis I and Uriah, *Ordered*, that an attachment issue out of and under the seal of this court to be directed to the sheriff of the county of Orange, to arrest the said Francis I. Marvin, and to bring him before the surrogate of Albany, at his office in the city of Albany, on the 12th July 1852, at 10 o'clock A. M., to answer for his misconduct herein; and that the penalty in which the said Francis I. shall give bond for his appearance to answer upon said attachment be five hundred dollars: and it is further ordered, that the application for an attachment against the said Uriah Marvin is denied."

On the 9th June 1852, Wever appealed from that part of the

sentence, or decree, denying an attachment against Uriah Marvin.

H. S. McCall, *for Appellant.*

Northrop & Williams, *for Respondent.*

Wright, Justice.—I doubted on the argument of this appeal as to the power to hear it at special term. I can not say that subsequent examination or reflection have satisfied me that the power exists. The Revised Statutes provided that an appeal of this kind might be made to the Court of Chancery (2 *R. S.* 610, § 104). The Court of Chancery being abolished, its powers and jurisdiction were conferred on the Supreme Court (*Judiciary Act of* 1847, § 16). The judiciary act provided that the justices of the present Supreme Court should possess the powers and exercise the jurisdiction possessed and exercised by the late justices of the Supreme Court, chancellor, vice-chancellors and circuit judges, so far as the powers and jurisdiction of said court and officers were consistent with the constitution and provisions of the judiciary act (§ 16). Formerly an appeal of this kind was heard by the chancellor, whether at a regular or special term of this court, can be, it seems to me, of no consequence to inquire. An appeal from the determination (in an appealable case, was directly to the Court for the Correction of Errors. Now the appeal from the surrogate is to the Supreme Court; but whether to be heard at general or special term, is the inquiry. If heard at special term, the effect will be to give three appeals; for it will hardly be contended that either party may appeal directly to the Court of Appeals from any order or decree I may now make. On the other hand, if an appeal can be taken in the present case from the special to the general term, it will be equivalent to appealing under the old system, from the chancellor to the chancellor. My impression is, that appeals from all decrees or sentences of surrogates should be first heard at general term; but as the parties desire that I should entertain this case, I will briefly examine it on the merits.

Wever presented his petition to the surrogate of the county of Albany, praying that Francis I. Marvin and Uriah Marvin render an account of their proceedings as executors of Uriah

Marvin, deceased. An executor after the expiration of eighteen months from the time of his appointment, may be required to render an account of his proceedings by an order of the surrogate, to be granted upon application from some person having a demand against the personal estate of the deceased, either as creditor, legatee, next of kin, or of some person in behalf of any minor having such claim; or without such application (2 *R. S.* 92, § 52) When Wever made the application, more than eighteen months had elapsed from the time of granting letters testamentary. His petition stated that he was "a creditor of Uriah Marvin, late of the city of Albany, deceased, and as such has claims against the estate of said deceased."

This was all that was set forth in the petition or otherwise, as to his being a creditor, or the nature of his claim.

The order of the surrogate was not made upon his own motion, but upon the application of Wever; and the first question arising upon the appeal is, whether enough appeared in the petition upon which the citation was issued to show that Wever, the applicant, was "a person having a demand against the personal estate of the deceased," as a creditor.

It is stated that he has claims against the estate of the deceased as a creditor. It is not stated to be sure, in terms, that as creditor he has a claim against the *personal* estate; but I think the allegation can not very well be understood in any other sense.

The petitioner is applying to the surrogate for an order that the executors render an account of their proceedings in relation to the *personal* estate alone; and it is upon such application that the allegation is put forth of his claims as creditor against the estate of the deceased.

The Marvins having appeared before the surrogate, they declined to produce any account, whereupon Wever moved that an attachment issue against them.

The issuing of an attachment against Uriah Marvin, was objected to on the ground that he was not an executor; letters testamentary having been issued only to Francis I. Marvin, which latter fact was affirmatively shown. The surrogate made an order granting the attachment as against Francis I. Marvin, but denying it as against Uriah Marvin.

The Revised Statutes provide that "every person named in a will as executor, and not named as such in the letters testamentary or in letters of administration with the will annexed, shall be deemed to be superseded thereby, and shall have no power or authority whatever, as such executor, until he shall appear and qualify" (2 *R. S.* 71, § 15). In this case, it appeared affirmatively, that although Uriah Marvin was named in the will as executor, he was not named as such in the letters testamentary; nor was there any proof that he had ever appeared in the surrogate's court and qualified. By the express provision of the statute he was superseded, and had no power or authority whatever as executor.

The surrogate could make no order that he account as executor. He had not been appointed by the surrogate, and though named in the will, was by the force of the statute superseded and divested of all power and authority.

The counsel for the appellant insists, that as he signed the notice of appraisal, and subscribed and swore to the affidavit annexed to the inventory, he is estopped from denying that he is executor. But the doctrine of estoppel *in pais* can not be applied.

The surrogate can not make or enforce an order that a person account as executor to whom letters testamentary have not issued pursuant to the provisions of the statute. He must have been appointed according to law, and not a mere wrong doer interfering with the estate, to give the surrogate jurisdiction over him. An executor *de son tort* is chargeable as such, and may be sued as executor generally: but a surrogate has no power under section 52, chapter 6, article 3d, title 3d, part 2d of the Revised Statutes, to call an executor *de son tort* to account.

The question in this case was one of power with the surrogate. As I view it, he might as well have called upon any other person not named in the will, but who chose to sign the notice of appraisal and swear to the affidavit annexed to the inventory, as upon Uriah Marvin to account before him.

In an action by the proper parties, if Uriah had taken possession of the personal estate, he not being administrator or executor, he would undoubtedly be liable and under certain circum-

stances the doctrine of estoppel might be applied; but the power of the surrogate to enforce an accounting is limited to the executor or administrator to whom letters have issued according to law, and who have appeared and qualified. Here, it affirmatively appeared that Uriah Marvin was not named in the letters testamentary.

He had not been appointed according to law, executor, and although named in the will as such, had by operation of the statute been superseded.

I think there is no error in the order of the surrogate; and that it should be affirmed.

SUPREME COURT.

Goodyear agt. Betts and Smith.

The 299th section of the Code is confined in its operation to cases where proceedings supplementary to execution have been instituted under the chapter in which it is found; it is not in the way, therefore, of an action in the nature of a creditor's bill for the purpose of having an assignment or other disposition of property by the judgment debtor declared fraudulent, &c.

A party applying to have property in controversy placed in the hands of a receiver, pending the litigation, must show at least a probable interest in the property, and that there is danger of its being lost without such protection.

Albany Special Term, April 1852. *Motion for a receiver.*

The complaint alleges that the plaintiff has recovered a judgment against the defendant Betts, upon which an execution has been issued and returned unsatisfied; that Betts, having been extensively engaged in business, had acquired a large amount of property, and that sundry persons had become indebted to him, and that on the 12th of January 1852, and before the recovery of the plaintiff's judgment, he assigned all his property and effects to the defendant Smith, for the benefit of creditors; and that Smith now claims to hold the property so assigned, in trust for the creditors of Betts. The complaint then proceeds to allege and

charge facts tending to show that the assignment was made to hinder and delay creditors. Among other things, it is alleged that Smith is wholly irresponsible; that he had not property enough to pay his debts. Upon the complaint, duly verified, and affidavits in support of the allegations and charges in the complaint, the plaintiff moved for the appointment of a receiver of the assigned property.

Affidavits were read in opposition to the motion, denying the solvency of Smith, and tending to show that the assignment was made in good faith.

J. H. Ramsay, *for Plaintiff.*

H. Smith, *for Defendants.*

Harris, Justice.—A question has been made whether a judgment creditor can, under the present practice, when the property of his debtor is in the hands of a third person, and is claimed by such third person, reach such property by an action brought directly for that purpose. The 299th section of the Code declares that when a person alleged to have property of a judgment debtor, claims an interest in such property, it shall be recoverable *only* in an action against such person *by the receiver.* It has been supposed that this provision rendered it necessary for the creditor, before proceeding to recover property alleged to have been fraudulently transferred by his debtor, to procure the appointment of a receiver and have the suit against the fraudulent assignee instituted by and in the name of the receiver. The language of the provision, when taken by itself, is certainly broad enough to bear this construction. It declares that the interest claimed by such third person "shall be recoverable *only* in an action against such person by the receiver." But I think it was intended that this provision should be confined, in its operation, to cases where proceedings supplementary to execution had been instituted under the provisions of the chapter in which this section is found. It had been provided that in certain cases, the judge before whom the proceedings should be had, might, without the intervention of a receiver, make an order for the application of the property of the debtor, whether in his own hands, or that of another person, to the satisfaction of the judgment. The provision in

the 299th section seems to have been intended as a restriction upon this power, so that it should only be exercised when the debtor's right to the property is undisputed. This, I think, is the fair meaning and true construction of this provision of the Code. It is not in the way, therefore, of an action, like that brought by the plaintiff, in the nature of a creditor's bill, for the purpose of having an assignment, or other disposition of property by the judgment debtor declared to be fraudulent, and the property applied to the satisfaction of the judgment.

But though the action is properly brought, I do not think the plaintiff is entitled to an order for the appointment of a receiver of the assigned property. The principle upon which the court directs property in controversy to be placed in the hands of a receiver, pending the litigation, is, that the party applying for a receiver has shown at least a probable interest in the property, and that there is danger of its being lost without such protection. The plaintiff charges upon information and belief only, that the assignee is not the owner of property or effects of any description sufficient to pay his debts and liabilities. This allegation, undenied, would be sufficient to show that the property was in danger, and required the appointment of a receiver (Connah vs. Sedgwick, 1 *Barb. R.* 210, and cases there cited). But the defendants' affidavits satisfactorily show that the plaintiff is mistaken in respect to the pecuniary condition of the assignee. There is, therefore, no ground for taking the assigned property out of his hands before the rights of the parties are determined by the judgment of the court.

The motion must, therefore, be denied with $10 costs, to abide the event of the suit.

SUPREME COURT.

THE SARATOGA AND WASHINGTON RAIL ROAD COMPANY agt. McCOY AND OTHERS, Trustees, &c

COSTS.

Where a decision is made upon demurrer, allowing a plaintiff to amend or plead over, upon payment of costs, the costs are to be construed *single* costs. If the defendants were public officers, and under the statute entitled to double costs, on the final determination of the suit they could not claim double costs on such an order, unless it expressly gave it to them in terms.

Washington Special Term, June 1852. The defendants demurred to the plaintiffs' reply, and judgment was given in their favor, with leave to the plaintiffs to amend on payment of costs.

The defendants were sued as trustees of a school district, and claimed the following costs:

1st.	Proceedings before notice of trial,	$12·00
	Subsequent to notice of trial,	7·00
	Trial,	15·00
	Cause on calendar, June term at Salem and postponed, costs to abide the event of the suit,	10·00
5th.	Cause on calendar, August term at Caldwell,	10·00
6th.	One half of above, in addition, allowed by statute,	27·00
	Disbursements in all,	5·02½
		$86·02½

—, *for Motion.*
—, *Opposed.*

CADY, Justice.—The 1st, 5th and 6th items were disallowed, and the costs adjusted at $37. The defendants move for a readjustment of the costs, and insist that the items which were disallowed, ought to have been allowed.

By the second subdivision of section 307 of the Code, the defendants were entitled to $5 instead of $12, for all the proceedings before notice of trial. By the third subdivision of § 307, the defendants were entitled for trial of an issue of law only, $12 instead of $15.

The 5th item in the bill was properly disallowed, as the cause was improperly noticed for trial at a special term. The most important question is, whether the defendants, as public officers, were entitled to double costs, under 2 *R. S.* 617, § 24, on the order of the court, granting the plaintiffs leave to amend, or plead over, on payment of costs?

By § 172 of the Code, after a decision of a demurrer, the court may in its *discretion*, allow the party to plead over, upon such *terms* as may be just. In this case, such allowance was made *upon payment of costs.* The *terms* were in the *discretion* of the court before whom the demurrer was tried, and the words used by the court do not import double costs; if the court had intended to grant the favor, on the payment of double costs, *double* costs would have been mentioned. The claim for double costs was properly disallowed. The costs ought to have been adjusted at $39 instead of $37. The defendants asked for more than they were entitled to. The order for readjusting the costs is allowed, without costs to either party.

COURT OF APPEALS.

GALE AND WISNER appellants agt. WELLS respondent.

The act passed at the last session of the legislature (April 16, 1852), repealing *sub.* 4. § 11 of the Code, which authorized appeals to be brought from orders of the courts below, "granting new trials," divested this court of all jurisdiction on such appeals; though brought previous to and pending, when the repealing act was passed.

The court, therefore, allow such appeals to be dismissed, *without costs of the appeal, or of the motion.*

June Term, 1852. In this case an order was made by the Supreme Court in the first judicial district, in November 1851, "granting a new trial" on a case. An appeal to this court from that order was made in January 1852, and the printed cases on the appeal were served upon the respondent's attorney in March.

The cause was placed upon the calendar of March term, and also upon that of the present term for argument. A motion was made at this term, on the part of the respondent to dismiss the appeal, with costs, on the ground that the amendments made at the last session of the legislature to the 11th section of the Code of Procedure deprived the Court of Appeals of the power to review orders granting new trials.

C. VAN SANTVOORD, *Attorney*, and
N. HILL JR., *Counsel for Respondent.*

JOHN M. PLATT, *Attorney*, and
BENJAMIN W. BONNEY, *Counsel for Appellants.*

The Court, RUGGLES, Ch. J.—Granted the motion that the appeal be dismissed, without costs, either of the motion or upon the appeal. [No written opinion was delivered.] *a*

a This is the first case decided by the Court of Appeals after the passage of the repealing act of April 16, 1852; which took effect as a law on the 6th day of May 1852.

COURT OF APPEALS.

PORTER AND BALLARD appellants agt. JONES Sh'ff, &c. respondent.

Where the appellants brought a regular appeal from an order of the Supreme Court granting a new trial upon a bill of exceptions, previous to the act of April 16, 1852, repealing *sub.* 4, § 11 of the Code, which authorized such appeals, and subsequent to a decision of this court allowing such appeals to be dismissed *without costs* to either party (not then reported—see Gale and Wisner agt. Wells, *ante p.* 191), the appellants served an offer in writing upon the respondent's attorney, to dismiss their appeal without costs to either party, which was declined: *Held*, that although the appellants were entitled to such an order, yet the respondent ought not to pay the *costs of the motion* to dismiss, for the reason that the respondent's attorney could not have reasonably been supposed to have then known and become acquainted with the late decision of this court.

September Term, 1852. *Motion by appellants for leave to dismiss their appeal without costs of the appeal to either party, but with the costs of this motion to be paid by respondent.*

The appeal in this case was taken upon a *bill of exceptions*, from an order of the Supreme Court *granting a new trial*. It was perfected on the 4th day of May 1852. Both parties noticed the appeal for argument at the last June term of this court; and on the 10th day of June 1852, the appellants served upon the respondent copies of the printed case.

The appellants' attorney in September 1852, served upon the respondent's attorney a notice as follows: (Title of the cause.) "Take notice that the appellants hereby offer to dismiss the appeal taken in this cause, without costs to either party, in accordance with the decision of the court in like cases. N. Y. Sept. 29, 1852. Yours, &c.

EDW. W. MARSH, *Att'y for Appellants.*

To Augustus L. Brown, Esq. *Att'y for Respondent.*"

The respondent's attorney declined to accept the offer, and insisted upon payment of costs of the appeal.

The appellants now make this motion.

R. W. PECKHAM, *for Motion.*

N. HILL JR., *Opposed.*

By the Court, JOHNSON, J.—The new trial below was granted upon a bill of exceptions. Under our decision in Moore and Westervelt, March T. 1852, an appeal might properly be brought in such a case. The point there decided being that where the new trial was granted upon a case in the court below, an appeal would not lie. An appeal was accordingly lawfully brought on the 4th day of May 1852. The act of April 16, 1852, amending the Code and taking away our jurisdiction to review any decision granting a new trial, even when made upon a bill of exceptions, did not take effect until May 6, 1852. It was not until the June term that we were called upon to say whether the effect of that act was to take away our power to hear appeals which were lawfully taken before the repeal of *sub.* 4, § 11 of the Code, by the act of April 16, 1852, and our decision on the point has not yet been reported. The appellant was therefore, at the time of his offer to dismiss his appeal without costs, entitled to an order to that effect. His appeal having been regular when taken, and he having taken no step in the cause after our

decision was made, we do not think costs should be given against the respondent for declining to allow the appeal to be dismissed without costs; it not appearing that our decision was known to him, and it having been so recently made that he could not reasonably be supposed to have become acquainted with it.

COURT OF APPEALS.

TOMPKINS appellant agt. SOULICE, Guardian &c. respondent.

A judgment of the Supreme Court affirming an order of a surrogate denying a motion for leave to discontinue proceedings of accounting in the matter of a guardian, and directing that the proofs be closed, is not an order or judgment which can be appealed to this court, because the surrogate's order affirmed in the Supreme Court is not a *final order*.

September Term, 1852. *Motion by respondent to dismiss the appeal in this case.* It appeared that Joseph Warren Tompkins Esq., of the town of White Plains in the county of Westchester, the appellant, was duly appointed by the surrogate of Westchester, guardian of the person of William E. Schotts, then an infant of five years of age and upwards, on the 19th of January 1847, until the infant should arrive at the age of fourteen years, and until another guardian should be appointed. That Tompkins acted as such guardian until the infant, Schotts, arrived at the age of fourteen years, when John Soulice, of the town of New Rochelle in the county of Westchester, was duly appointed guardian of said Schotts.

In the month of January 1847, Tompkins, alleging that he had while guardian received and paid out various sums of money as such guardian, for his ward, applied to the surrogate of Westchester to have his accounts finally settled, and obtained a citation for Soulice, the succeeding guardian, to attend the final settlement. The citation was returnable and returned on the 15th February 1847. The parties appeared before the surrogate on that day, and Tompkins rendered his accounts, verified, and filed them with the surrogate, together with the vouchers.

It appeared that the hearing was from time to time adjourned, and witnesses examined before the surrogate by the respective parties. That in consequence of an appeal to the chancellor having been taken by Soulice from an order of the surrogate closing the proofs, proceedings were suspended until the 24th August 1849, no order or decree of the surrogate having ever been made in relation to such accounts during that time. On the 24th August 1849, the day appointed for a further hearing before the surrogate, Tompkins appeared by Wm. H. Pemberton, his clerk, and Soulice by Wm. Silliman, his counsel, when Tompkins, by his clerk, read a notice of discontinuance, as follows:

(Title of the matter.) "To Lewis C. Platt, Esq., surrogate of Westchester county: I am now detained at Bedford, and sick, and it is impossible for me to file my amended account to day and have my witnesses in court; and as I find it necessary to file a new account, I am, therefore, compelled to withdraw my petition, account and all proceedings in the matter; and I do hereby withdraw the same and discontinue all proceedings in the matter, so that I can commence anew. I tender and am ready to pay all costs and charges as soon as they are taxed and ascertained.

Dated August 24, 1849. J. W. Tompkins."

The costs and charges of Soulice, the guardian, in all the proceedings in said accounting, and the fees and charges of the surrogate were then offered to be paid on behalf of Tompkins. The counsel for Soulice insisted that Tompkins had no right to discontinue the proceedings, and moved that the surrogate proceed and close the proofs; and thereupon the surrogate made the following order:

"At a Surrogate's Court, held in and for the county of Westchester, at the surrogate's office in the town of White Plains, on the 24th day of August 1849. Present Lewis C. Platt, surrogate. In the matter of the accounting of J. W. Tompkins, the late guardian of Wm. E. Schotts, an infant. The matter having been adjourned to this day, and John Soulice, the general guardian of the above named infant, appearing by William Silliman, Esq. his proctor and counsel, and J. W. Tompkins appearing by Wm. H. Pemberton, and the said John Soulice having prepared to proceed in this matter, the said J. W. Tompkins, by his said

proctor and counsel, moved this court for leave to discontinue; which motion being opposed by the said guardian, it is therefore ordered, that the said motion to discontinue be denied, and that the hearing in this matter proceed; and the said guardian, by his counsel, therefore moved for an order that the proofs in this matter be closed; and it is therefore ordered that the proofs in this matter be closed. LEWIS C. PLATT, *Surrogate.*"

Tompkins, on the 30th August 1849, appealed from this order to the general term of the Supreme Court in the second judicial district. And at a general term of said Supreme Court held at Poughkeepsie on the 13th January 1852, before Justices MORSE, BARCULO and BROWN, an order was made, after argument of the appeal, that the order or decree appealed from be affirmed with costs.

Tompkins, on the 6th March 1852, brought an appeal from the order of the Supreme Court to this court.

WM. SILLIMAN, *for Motion.*

N. HILL, JR., *Opposed.*

By the Court, RUGGLES, Ch. Judge.—In Messerve agt. Sutton (3 *Comst.* 546), Catharine Ann Messerve instituted proceedings before the surrogate of New York to recover a legacy, and cited the executors, who appeared and contested her right. The surrogate, after hearing, dismissed her petition. She appealed to the Supreme Court where the decision of the surrogate was reversed and he was directed to proceed with the account. On appeal to this court from the decision of the Supreme Court, a motion was made to dismiss the appeal on the ground that the judgment of the Supreme Court was not final. But it was held that the judgment of the Supreme Court was final as respected that court, and the motion was denied.

In another case determined in this court, there had been a final judgment in the Common Pleas of New York, which was reversed on writ of error by the Supreme Court, and a new trial ordered. An appeal from the judgment of the Supreme Court to the Court of Appeals was held to be well brought. But in both these cases, the original order in the court below, which was reversed in the Supreme Court, was a final judgment.

In that respect those cases differed from the present. We can not review the judgment of affirmance by the Supreme Court in the present case, because the surrogate's order affirmed by the Supreme Court was not final.

The parties must proceed to a final determination in the Surrogate's Court, and if the appellant in the present case should feel aggrieved by that determination he can then appeal; and if the order now appealed from be one affecting the merits of the case, it may be reviewed on that appeal.

COURT OF APPEALS.

WELLS respondent agt. DANFORTH appellant.

The two years limitation, by the statute, for bringing an appeal to this court, begins to run from the date of the *entry of the order for final judgment in the court below.* (*See Bank of Geneva agt. Hotchkiss, 5 How. Pr. Rep.* 478, *to the same point.*)

September Term, 1852. The order for final judgment in the Supreme Court in this case was entered in May 1849; but the judgment was not perfected (docketed) until the 4th of December 1849.

An appeal was taken and notice served by the appellant on the 3d December 1851.

The respondent moved to dismiss the appeal, on the ground that more than two years had elapsed from the time of the entry of the order for final judgment in the Supreme Court, before the appeal was brought.

The appellant read an affidavit that the respondent's attorney had never served upon the attorneys of the appellant a copy of any order of the final determination or judgment of the Supreme Court.

W. WELLS, *Attorney*, and
JOHN H. REYNOLDS, *Counsel for Respondent.*

SANFORD & DANFORTH, *Attorneys*, and
R. W. PECKHAM, *Counsel for Appellant*

The court granted the motion to dismiss the appeal on the ground that it had not been brought within two years from the entry of the order for final judgment in the Supreme Court.

There were some terms, by way of costs, imposed upon the respondent, on granting this motion, having relation to a former motion to dismiss the appeal on other grounds.

SUPREME COURT.

BOUTON agt. THE CITY OF BROOKLYN AND BRIANT.

A court of law only provides a redress for a wrong actually sustained. A court of equity grants a preventive within certain limits. The Supreme Court, in which the functions of both are joined, can not extend its power beyond what was possessed by the one or the other previous to the junction of the two.

No court of law or equity can directly annul the proceedings of an inferior tribunal of a municipal corporation, unless they are regularly brought before it upon a certiorari or other appropriate process, addressed to the subordinate body.

This court will not, by the exercise of its powers in equity, even for the purpose of removing an alleged cloud upon title, review the proceedings of subordinate tribunals of municipal corporations.

Some rules laid down for the construction of statutes.

The 30th section of title 4 of the act passed April 4, 1850 (which act constitutes the present charter of the city of Brooklyn), provides that the expenses of constructing wells and pumps, public cisterns, lamp-posts and lamps, flagging side walks, of fencing and filling in lots, *and all other improvements of a like nature*, not before specified, are to be assessed by the street commissioner of the city. *Held*, that the assessment for grading a *public park* (Washington) comes within this clause.

Kings County Special Term, 1852. The complaint states that by an act of the legislature of the state of New York, passed the 23d day of April 1835, a public square was laid out in what is called the seventh ward of the city of Brooklyn; that subsequently, by an act of the said legislature, passed April 25, 1845, the location of the said Washington park was changed to what is now called the eleventh ward in said city; and in and

by said acts, the property taken for the said park was declared to be a public park; and the said Washington park was subsequently opened as a public park, pursuant to several acts of the said legislature, passed the 24th day of March 1848. The city of Brooklyn was authorized to create a loan for the payment of the amount necessary to be paid for the land and other matters connected with the said park, and the faith, property and effects of the said city of Brooklyn were pledged, in and by said acts, for the payment of said loan; that defendants, the City of Brooklyn, as such corporation, took the title and possession of said park; that some years after the said corporation had been seized of the title and became in the possession of the said park, they undertook and did enter into contracts for the regulating and improving said park, and did, as the plaintiff from information and belief charges, enter into contracts for the regulating and improving of said park to the amount of upwards of $34,000; and thereafter, without any color, license, or authority by law, proceeded to take proceedings for the purpose of assessing the said amount as a local assessment upon the several lots, pieces or parcels of land benefited thereby, in proportion to the benefit which, in the opinion of the street commissioner of the city of Brooklyn, the same shall derive from, or in justice ought to be assessed for the same; and claims that the defendants, the City of Brooklyn, had no right whatever, under any law of this state, to impose the said assessment upon the plaintiff's property, and the property of said other persons, for the said grading and improving of Washington park; that the said defendants have, without any warrant or authority assessed the plaintiff and the said other persons, and have made the same a local assessment; whereas, by the law of the land, the said park is declared to be a public park, and the expense of grading and improving the same, should be a charge upon the whole city, and not upon any local district in said city; and enumerates other objections to the legality of the assessment; which, with the other facts of the case, sufficiently appear in the opinion of the court.

The defendant Briant, is the collector of taxes and assessments of said city, and had levied upon property of the persons assessed.

The complaint prays for an injunction, restraining the proceedings both of the city and the collector.

The defendants demur to the complaint; and specify and assign the following causes of demurrer:

That the complaint does not state facts which constitute a case for the equitable relief specifically sought, or for any other relief whatever in equity, or for damages in a court of law.

That the facts stated do not show the proceedings of the defendants to have been either void or irregular.

That the facts stated do not show a cloud upon the plaintiff's title, or any other grievance or injury suffered or apprehended, which is the subject of legal or equitable cognizance.

And that said complaint, in these and other particulars, does not state facts sufficient to constitute a cause of action against the defendants jointly or severally.

A. CRIST, *for Plaintiff.*

J. M. VAN COTT, *for Defendants.*

S. B. STRONG, Justice.—The assessment of which the plaintiff complains, was made by the street commissioner of the city of Brooklyn for grading Washington park. The plaintiff alleges that the charter of that city did not authorize such assessment, and asks that this court shall declare it to be null and void, and not a lien or incumbrance upon the property assessed; that the defendant Briant, who is the collector of the taxes and assessments of the city, may be perpetually enjoined from proceeding under the warrant to him to collect the amount of the assailed assessment, and that the city of Brooklyn may be required to pay the damages sustained by the plaintiff by reason of such unauthorized proceedings.

The first, and as I view the case, the most material question involved in this controversy is, whether the assessment was warranted by the statute; that the legislature has the power to provide for making and enforcing local assessments for local improvements has been decided, and in my opinion correctly decided, by the Court of Appeals.

Several acts have been passed relative to Washington park. They all speak of it as a public improvement, and as public

property. The corporation, therefore, holds it as trustees for a designated purpose, and have not the absolute and unqualified title to it, to dispose of it as they may think proper for general objects. It therefore comes within the range of subjects deemed by the legislature proper for local taxation, and the assessment for the expenses of its improvement is not brought within the objection of taxing the property of one for the benefit of another, which, if well founded, would be fatal to its validity.

The act of April 27, 1847, relative to Washington park (§ 8), authorized the city of Brooklyn to make any improvement on the park or square in connection with it, which they might deem proper. The act of March 24th, 1848, relative to the same park, provided for the payment of the expenses caused by any proceedings then had under the act of 1847, but has no reference to any future improvements. When the act of April 4th, 1850, to revise and amend the several acts relating to the city of Brooklyn, and which constitutes its existing charter was passed, there was no statute providing specially and separately for paying for future improvements to Washington park. The provisions of that act extended to that park as they purported to relate to all such establishments in the city, and they conferred all the power possessed by the corporation or any of its officers to make improvements upon it, or to provide for their payment. The first section of title 4, of that act, authorizes the common council to cause streets and avenues to be opened and widened, and to be regulated and paved, and to cause public squares and parks to be opened, regulated, ornamented and protected, and streets and avenues to be kept in repair, and from time to time to be repaved, or regraded and repaired; to close up and discontinue roads, streets, lanes and avenues; to provide that lamps and lamp-posts be erected, and cisterns made for the purpose of furnishing water in case of fire; to cause sewers and drains, wells and pumps, to be constructed and repaired, and generally to make such *other improvements* in and about such streets, avenues and squares, as the public convenience may require; and it provides that the expenses of all such improvements, except for repairs, shall be assessed, and be a lien upon the property benefited thereby, in proportion to the amount of such benefit. The third.

section of the same title provides that the expenses for opening or widening streets, roads, avenues, parks, or squares, shall be estimated and assessed by three commissioners, to be appointed by the County Court or Supreme Court. The 22d and 23d sections of the same title provide that the expenses of regulating, grading and paving, and of regrading and repaving streets, and of constructing sewers and drains, shall be apportioned and assessed by one or more commissioners, to be appointed in like manner. By the 30th section of the same title, the expenses of constructing wells and pumps, public cisterns, lamp-posts and lamps, flagging side walks, of fencing and filling in lots, and all other improvements of a like nature, not before specified, are to be assessed by the street commissioner of the city. The authority to make the assessment in question is claimed under this 30th section.

It was admitted on the argument, by the counsel for the plaintiff, that the power to *grade* this park was conferred upon the corporation by the first section of the fourth title of the act which I have quoted. If so, that section also directs that the expenses of such improvement shall be assessed, and be a lien on the property benefited thereby, in proportion to the amount of the benefit conferred. This, then, confers upon the corporation the power, and imposes upon them the duty of making an assessment to pay for such expenses. The question very naturally suggests itself, whether the legislature would have conferred such power and imposed such duty, without at the same time providing the requisite means for performing the power and discharging the duty. That is not to be presumed. The inference is altogether the other way. Judge Jewett remarks, in Stief vs Heart (1 *Comst. R.* 30), that when a power is given by the statute, every thing necessary to making it effectual or requisite to obtaining the end, is implied. Probably the remark is too general. Where ordinary common law incidents are necessary to render a power effectual, they may undoubtedly be inferred, although not mentioned in the statute; but when such incidents do not go far enough, and no statutory means are provided to carry the power into effect, it must fail. Where, however, there are provisions in the statute, probably designed to give effect to

the power, but couched in such general terms that the design can not be inferred with certainty, they should receive a liberal construction towards effectuating the power. That is emphatically true, whereas in this case the statute is remedial and not penal. Accordingly, Chancellor Kent says (1 *Comment's*, 465) such statutes are to receive an equitable interpretation by which the letter of the act is sometimes restrained *and sometimes enlarged*, so as to meet the beneficial end in view, and prevent a failure of the remedy. The same accomplished judge and elegant writer says (1 *Comment's*, 461-2); it is an established rule in the exposition of statutes, that the intention of the lawgiver is to be deduced from a view of the whole and of any part of a statute taken and compared together (1 *Co. Lit.* 301, *a*). The real intention, when accurately ascertained, will always prevail over the literal sense of terms. *Scire leges, hoc non est verba harum tenere sed vim ac potestatem*, and the reason and intention of the lawgiver will control the strict letter of the law when the letter would lead to palpable injustice, contradiction and absurdity. When the words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law: from the necessity felt, and the remedy in view; and the intention is to be taken or presumed according to what is consonant to reason and good sense. The 30th section of the 4th title of the act which I have quoted, authorizes the street commissioner to assess (as he has done in the instance under consideration) the expenses of constructing wells and pumps, public cisterns, lamp-posts and lamps, flagging side walks, of fencing or filling in lots, and all other improvements of a *like nature*, not before specified; and the question is, whether grading a park is such improvement—clearly it is an improvement, and as clearly it had not been before specified in the statute. It had been included in general terms. Was it, then, 'like' the other improvements specified in the same section? It could not have designed that it should resemble each of them in every respect, for in some particulars such specified improvements differ materially from each other. There is not much resemblance between constructing a lamp-post and filling in lots. The statute probably had reference to some classification made by its own pro-

visions rather than to any designation by 'nature,' according to the more usual interpretation of that word. There is very little natural similitude between the subjects specified in the 30th section; but the statute places them in the same class with each other, and in some important particulars, with the improvement in question. They are alike local in their benefits, and equally call for local assessments to pay for them—at least, such was the opinion of the legislature, as they were all included in the same category in the first section of the title. They are all, too, improvements upon property already belonging to the public, and do not require the assumption of private property for public purposes. In this particular they differ from the improvements specified in the third section, where the assessments are to be made by three commissioners appointed by a court, and are not subjected to the "one-man-power." The number of the commissioners and the manner of their appointment, when private property is taken for the use of the public, and the damages sustained by the owners are to be estimated and determined, are directed by the constitution, and it was in obedience to the constitutional provision, as well as in reference to the importance of the duties to be discharged, that the legislature guarded these public works more cautiously than the others specified in the statute. It does not very clearly appear that the legislature in classifying the improvements had reference to the greater or less expenditure which they might create. Public works of the same nature may vary from each other most essentially in their costliness. The expense of grading a park depends upon its size and the unevenness of the surface. If it should be of small extent, and the ground should be even and correspond with the level of the surrounding streets, the expense of grading it would be inconsiderable, much less than that caused by filling in lots to which, in many particulars, it has a strong resemblance. Neither is it probable that the legislature had any special reference to the extent of the district to be affected by the improvement and assessed for its expense. Some of those enumerated in the last class, such as flagging side walks and fencing and filling in lots, might extend over a large district, whilst constructing wells, pumps and cisterns could benefit but comparatively a small number.

After all, however, the points of resemblance between the improvement in question and those particularly specified, are not sufficiently numerous or strong to lead by their own weight to any certain conclusion; but, taken in connection with the evident design of the legislature, that such improvement should be made and the consequent expenses paid through this species of local taxation, and the fact that no authority is given in any other part of the statute, or (as far as I know) any where else, to raise the requisite funds, they are sufficient to warrant the conclusion which I have adopted, that the assessment in question was authorized by the statute, and is consequently valid.

The other important question involved in this controversy is, whether if the assessment had been invalid the plaintiff would have been entitled to the relief demanded in his complaint. I shall consider this question, as the determination of it will be material, if the opinion which I have adopted upon the point which I have already discussed should be erroneous.

The relief demanded, except the compensation in damages, can be awarded by this court, if at all, only in the exercise of its equitable jurisdiction. Damages may be given as a part of a remedy strictly equitable; and when, as in this case, the principal relief demanded is of that class, the claim for such damages partakes of the same character. Is it, then, competent for this court, under the additional powers recently conferred upon it, to award the desired relief? It has entire cognizance of cases both at law and in equity. The distinction between legal and equitable remedies has been abolished by the Code. The mode is identical, but the limits of either have not been extended. This court, in administering equity, is confined to the cases in which courts of equity had jurisdiction previous to the late change. If not, the question may well be asked, where will it stop?

Abstract ideas of equity are somewhat indefinite, and there could not be an uniform rule governing the several branches, and numerous judges of this court. We have not yet necessarily arrived at that degree of uncertainty and consequent confusion, and I trust that we never shall. The most that can be effected by the change is, that when a plaintiff states a case which entitles him to some redress in the law, he shall not be turned out

of court because he may be mistaken in the species of redress which he has demanded in his complaint. But he is still bound to state his case in such a manner as to enable the court to grant him some specific redress, according to old established principles. They have not been changed.

Now, no court of law or equity could directly annul the proceedings of an inferior tribunal of a municipal corporation, unless they were regularly brought before it upon a certiorari, or some other appropriate process addressed to the subordinate court or body. Nor could a court of law in any other way make any order or render any judgment generally sustaining the action of such tribunal or body? That could be done only in a court of equity. This court has now the same powers; but neither that, nor the class of cases over which it can be exercised, has been increased Now, in this case, no process has been issued to the corporation to bring up specifically the proceedings complained of, nor are they here in such a manner as to enable this court to set them aside: but an appeal is made to the court in the exercise of its power in equity, to declare their nullity, and to prevent their operation. Can this appeal be successful according to the established rules which have heretofore prevailed in a Court of Chancery? The plaintiff claims the desired interposition of this court, because, first, he has no other remedy; secondly, the assessment casts a cloud upon his title to the land affected by the lien; and third, it will prevent a multiplicity of suits. These are all valid causes for relief in proper cases. The question is, whether this is one of that class?

The plaintiff, and those who are associated with him in this suit, have another, and I think an adequate remedy for any wrong which they may have sustained by the assessment. If it was a judicial proceeding, it can be reviewed on certiorari, and set aside, if invalid, from a want of jurisdiction. If, as is alleged, it is void for that cause, and the moneys should be collected and paid into the city treasury, they could be recovered by the payers, in an action against the corporation. True, it might be better in this case to prevent the wrong than to allow it to go on, and when perpetrated, redress it. But the law does not regard particular cases; it is necessarily applicable to the exigencies of

classes rather than of individuals. As a general rule, it would be injudicious to interfere to prevent apprehended wrongs; and the law, therefore, limits such interference to cases where the complaining party would be without adequate redress.

If the assessment is void from a want of the requisite power to make it, it can not constitute a lien upon the plaintiff's real estate. It might, nevertheless, be a cloud upon his title, were it not for the fact that the objection, if any, is apparent on the face of the proceedings. They show that the assessment was made by the street commissioner for grading a park, and if the statute gave no authority for the procedure, its nullity must be evident to any one examining the papers, as all are supposed to know the law. In such cases the court does not interpose to remove the cloud, because, if there be any, it is so thin that it can do no serious injury. Besides, it was decided by both the late Court of Chancery and the Court for the Correction of Errors, that a court of equity will not, even for the purpose of removing an alleged cloud, review the proceedings of subordinate tribunals of municipal corporations (Mooers vs. Smedley, 6 *Johns. Ch. R.* 28; Mayor, &c. of Brooklyn vs. Messerole, 26 *Wend.* 132). If it was competent for this court under the existing system, to extend its jurisdiction in this particular to that class of cases, it would be highly inexpedient to do so, as it would constitute a source of excessive and unnecessary litigation.

The remaining question is, whether, supposing the assessment to be invalid, the circumstances attending it present a proper case for the desired interposition of this court to prevent a multiplicity of suits. The practice was originally introduced for the protection of any one who might be threatened with the attacks of numerous litigants having, in common, claims against him, based upon the same facts and principles. In this case there has not been any such suit nor is any threatened. The plaintiff apprehends that something may be done which will lead to a law suit, and probably to many. But that is not enough to justify the interposition of this court by way of prevention. That is not granted until the plaintiff has established his right by at least one successful suit at law; a bill of peace is sometimes entertained to settle the rights of several parties in a single suit brought

under the direction of the court. But the plaintiff does not ask for that relief, nor could this court direct a suit to be brought before any cause of action had actually accrued. The plaintiff does not ask this court to prevent, by judicial action, a multiplicity of suits, but to prevent the consummation of an act which might give rise to litigation. That is not done except when the evil threatened would, if perpetrated, be irremediable, or, at any rate, be so extensive as to clearly take it out of the ordinary class of private wrongs. Neither is the case in the action before me.

Upon the whole, I am satisfied that the facts set forth in the complaint are not sufficient to entitle the plaintiff to the remedy he demands. I rest my opinion upon the following principles. A court of law only provides a redress for a wrong actually sustained. A court of equity grants a preventive within certain limits, which do not include the case presented by the plaintiff. A court in which the functions of both are joined, can not extend its power beyond what was possessed by the one or the other previous to the junction of the two. And an assimilation of remedies can not extend the operation of either beyond the limits assigned to the most extensive, when each operated in its own separate sphere.

There must be judgment for the defendants on the demurrer, and the complaint must be dismissed.

SUPREME COURT.

Van Sickler agt. Graham and others Adm'rs, &c.

Where administrators successfully litigate a claim against the estate, referred under the statute, they are not entitled to an additional allowance or per centage. They are not entitled to *costs* given by the Code, only to disbursements, and of course not to an additional allowance.

Quere? **Whether costs can be allowed in such case under the old fee bill.**

Dutchess Special Term, November 1852. Van Sickler presented a claim against the estate represented by the defendants

which claims they disputed; and it was referred pursuant to the statute to three referees. A hearing was had which lasted two days, both parties examining witnesses. After the administrators had closed their testimony, Van Sickler withdrew his claim and "submitted to a nonsuit." The administrators now apply for allowance, or per centage, under § 307 and 308 of the Code.

G. G. Reynolds, *for Administrators.*

E. A. Brewster, *for Van Sickler.*

Barculo, Justice.—It would be a matter of course to allow a per centage in this case, if I was satisfied that the administrators are entitled to costs under the Code; for, by the rules adopted in this district at the general term in January last, it is provided, that "such allowances will be made whenever there has been a trial, and the parties have appeared and litigated the question in controversy."

But I am unable to discover any thing in the Code which gives the administrators any costs at all beyond disbursements. It is quite clear that, under the Revised Statutes, costs could be adjudged by the court (2 *R. S.* 89, § 37). But it is equally clear that this reference is not an *action*, within the definition of the Code; for it is not "an ordinary proceeding in a court of justice, by which a party prosecutes another party," &c.; nor is it commenced "by the service of a summons," as that act requires all civil actions to be commenced in a court of record (§ 127).

Again; the general provisions of the Code, contained in title ten of the second part, regulate costs only in *actions*, and do not refer to or alter costs in special proceedings pending in the Supreme Court. The defendants are not, therefore, entitled to the costs given by the Code, and, of course, can not claim the per centage, which may be allowed only in *addition* to the costs given by the Code.

Whether, in a case of this kind, costs can be allowed according to the old fee bill, is a question which I am not now called on to decide. The authors of the Code of 1851, seemed to suppose that costs could not be allowed at all, if we may draw an inference from an interpolation in § 317, which provides that "whenever any claims against a deceased person shall be refer-

red pursuant to the provisions of the Revised Statutes, the prevailing party shall be entitled to recover the fees of reference and witnesses, and other necessary disbursements to be taxed, according to law." This act, at any rate, secures to the defendants their disbursements, but they are not entitled to a per centage. Motion denied without costs.

SUPREME COURT.

THE HERKIMER COUNTY MUTUAL INSURANCE COMPANY agt. FULLER.

The directors of a Mutual Insurance Company in assessing the proportion of their losses to be paid by the maker of each deposit note, do not act judicially; if they omit to assess the deposit notes of any persons *then being* members, and liable for their proportions of the losses, the assessment is invalid.

In making such assessment they have no right to take into consideration the length of time any person has been a member.

Onondaga Special Term, June 1852. *Motion to strike out a part of the defendant's answer, as redundant and irrelevant.* The action is brought upon a premium note, executed by the defendant to plaintiffs. The note is for $441, and bears date the 31st of January 1848. The complaint alleges that the directors of the plaintiff's company, having received notice of certain losses and damage by fire, and having ascertained such losses and damages, did on the 19th of November 1849, "settle and determine the sums to be paid by the several members thereof, as their respective proportions of such losses, and that the amount which the defendant thus became liable to pay, was $35·28, *which sum was in proportion to the amount of his deposit note.*"

The answer alleges, among other things, that the directors, when settling and determining the amount to be paid by the several members of the company, "wrongfully omitted and neglected to assess the deposit notes of divers persons then being members of said company and liable for their proportions of said losses, by which omissions and neglect the defendant was assessed more than his just proportion."

It is also alleged that the directors in making the assessment included therein certain sums which had before been assessed against divers persons, then being members of the company, and who had been released from the payment thereof.

These portions of the answer the plaintiffs moved to strike out as irrelevant.

W. Brooks Jr., *for Plaintiffs.*

H. Baker, *for Defendant.*

Harris, Justice.—It was insisted by the counsel for the plaintiffs, upon the argument, that the directors, having acquired jurisdiction by ascertaining the loss, acted judicially in making their assessment; that it was for them to determine whether an assessment was necessary, and if it was, upon what members it should be made, and how much should be paid by each. But I do not so understand the requirements of the plaintiffs' charter. The 8th section of the act to incorporate the Jefferson Mutual Insurance Company (*Sess. Laws* 1836, *p.* 44), the provisions of which are adopted in the plaintiffs' charter (*Sess. Laws* 1836, *p.* 197) declares that every member of the company shall be bound to pay for losses, &c. "in proportion to the amount of his deposit note;" and the 10th section provides that the directors, having ascertained the loss, "shall settle and determine the sums to be paid by the several members of the company, as their respective proportion of such loss;" and declares that "the sum to be paid by each member shall *always* be in proportion to the original amount of his deposit note or notes."

In pursuance of their duty, as thus prescribed, the directors, having ascertained that the company is liable for a loss, and that the company have not funds sufficient to pay such loss, are first to ascertain *who were members of the company at the time the loss occurred*, and having ascertained this, their assessment is to be made upon each, in the proportion which the amount of his deposit note bears to the aggregate amount of all the deposit notes. I can not agree with the plaintiffs' counsel that the directors have a right to take into consideration the length of time any person has been a member, in determining the amount of his assessment, or whether he shall be assesed at all. Whether

he has been a member for a day or a year, and whatever the amount he has previously paid, but one rule of assessment is prescribed. It is the proportion which his deposit note bears to the amount of the deposit notes of all the members. If, therefore, the directors have, as the defendant has alleged in his answer, "omitted to assess the deposit notes of divers persons, then being members and liable for their proportions of the losses," and have thus increased the amount of the defendant's assessment, they have done what, I think, they had no authority for doing, and the assessment is invalid. So too, if they have included in the assessment the amount of previous assessments, from the payment of which the parties assessed had been released, it seems to me, very clear, that they transcended the power conferred upon them by their act of incorporation.

The allegations in that part of the answer to which this motion applies, are, therefore, not irrelevant. On the contrary, unless I am mistaken in the view I have taken of the provisions of the plaintiffs' charter, in respect to the power of the directors to make assessments, these allegations, if sustained at the trial, will prove fatal to the plaintiffs' action. The motion must, therefore, be denied with $7 costs.

SUPREME COURT.

In Re Henry M. Taylor.

Bail in an action who have been excepted to and do not justify, can surrender the defendant to the sheriff.

It seems, that such surrender can be made by any one of the bail.

Cayuga County. At Chambers, on Habeas Corpus. In August 1851, an action in the Supreme Court was commenced against the petitioner Taylor, in which he was arrested and held to bail in the sum of $10,000. An undertaking signed and acknowledged by *ten* persons, as sureties, was given; upon the receipt of which the sheriff permitted the petitioner to go at large. A certified

copy of the undertaking was served upon the attorney for the plaintiff, who in due time excepted to the sufficiency of the sureties thereto. Notice of justification was given by the sheriff, but the sureties never justified.

In October 1852, *eight* of the sureties procured a certified copy of the undertaking and endorsed thereon an authority to one William Muir to arrest the petitioner for the purpose of surrendering him to the sheriff of Cayuga county. The arrest and surrender were made, and the copy of the undertaking delivered to the sheriff.

The petitioner sued out a writ of habeas corpus for his discharge, and assigned as the reason why his confinement was illegal: 1st. That the persons by whom the authority to arrest was signed, not having justified, were not the *bail* within the meaning of the section of the Code under which the said authority was given, and therefore they could not effect a surrender.

2d. That if they were the bail, then the authority to arrest not being signed by *all* the sureties, was void, and his detention thereon illegal.

The sheriff's return to the writ, was in conformity with the above facts, and to it was annexed the certified copy of the undertaking, with the authority to arrest, endorsed thereon.

CLARENCE A. SEWARD and DAVID WRIGHT, *for Petitioner.*

GEORGE UNDERWOOD, *for the Sureties.*

HUMPHREY, County Judge.—The discharge of the defendant is claimed for the reasons, 1st. That the bail who signed the undertaking on the arrest of the defendant not having justified, after exception, are not the bail of the defendant.

The Code has made bail taken on the arrest of the defendant in a civil action, to supply the place of bail to the sheriff, and special bail of the Revised Statutes. Section 203 (178) of the Code, makes bail taken upon the arrest, who do not justify after exception, liable to the sheriff for damages which he may sustain such omission. And section 201 (176) makes the sheriff himself liable as bail where bail is excepted to and do not justify. Had the sureties in the undertaking justified, the sheriff would have been exonerated from liability, according to section 196 (171).

Hence, the omission to justify has made the sheriff liable to the plaintiff as bail, and the bail taken on the arrest of the defendant liable to the sheriff for damages which he may sustain by reason thereof. The damages occasioned to the sheriff is, that he becomes bail to the plaintiff, and the bail taken on the arrest thus becomes bail to the sheriff.

By section 188 (163) of the Code, bail may surrender the defendant in their exoneration, at any time before a failure to comply with the undertaking, stating the manner in which it shall be done. Section 189 (164) gives the bail the power to arrest the defendant, at any time or place before they are charged, for the purpose of surrendering him; or by a written authority endorsed on a certified copy of the undertaking, the bail may empower any person of suitable age and discretion to arrest him.

By the Revised Statutes, bail to the sheriff as well as special bail, had the power to surrender their principal; and the section of the Code confers this power upon the bail which is made to answer to bail to the sheriff, or bail in the action to the plaintiff, according to the exigency of each case; depending upon the fact whether they have justified or not, after exception.

The provisions of the Code make the persons who execute the undertaking on the arrest of the defendant, liable as bail. The execution of the undertaking fixes their character as bail; if they are not excepted to, or if excepted to, and they justify as bail, the sheriff is exonerated from liability; if they are excepted to and do not justify, they are liable to the sheriff. Justification does not increase or diminish their liability. It is only a question whether the sheriff shall be exonerated, or whether he shall stand between the bail and the plaintiff in the action.

I am led to the conclusion that their position is that of bail to the sheriff, and that they have the right, as such bail, to surrender the defendant to the sheriff of Cayuga county in their exoneration.

2d. An objection was made to the manner of the arrest, that *eight* only of the ten persons who executed the undertaking, signed the authority to arrest. Four fifths of the bail united in giving this authority. Cases might frequently arise in which it might be impossible to obtain the consent of all the persons who

signed the undertaking, to a surrender of the principal. There might be one or more, who by their particular relations with the principal, or for other reasons, would not consent to a surrender. Would it be just that the remainder should be prevented from exonerating themselves by a surrender? I am of opinion that eight of the persons who signed the undertaking were sufficient to make a surrender. Petitioner remanded.

SUPREME COURT.

JAYCOCKS agt. AYRES.

An answer in slander which justifies the words alleged in the complaint, "she is a thief, and has stole my gold pen and pencil," may properly allege a variety of thefts of different articles by the plaintiff, other than those specified in the complaint. Why? Because they may be proved to show that the plaintiff *is* a thief, which is a distinct allegation in the complaint of actionable words.

Dutchess Special Term, November 1852. The complaint contains two counts. In the first count it alleges that defendant slandered the plaintiff by these words: "I have come for the spoons you stole; deliver up the keys of your trunk, for you have stolen them. The astrologer told me you had them, you thief."

In the second count the words are laid thus "Susan Mary has robbed me. She is a thief, has stole my spoons, and gold pen and pencil."

The answer denies speaking the words contained in the first count. But, as to the second count, the answer only denies charging the plaintiff with stealing "spoons;" and admits the other words. It then proceeds to justify the admitted words, by alleging that they are true, and that at a specified time and place the plaintiff feloniously took and stole from the defendant "five boxes of tooth paste;" and at another time and place, "one cloth cloak of the value of twenty-five dollars, and one cashmere shawl of the value of thirty-five dollars," and, at another time and place, "one gold pen and case and one gold

pencil case;" and at other times and places, various other specified articles of personal property.

The plaintiff now moves to strike out portions of the answer as irrelevant, impertinent and scandalous.

L. MAISON, *for Plaintiff.*

WALLIS & BRADSHAW, *for Defendant.*

BARCULO Justice.—The only question to be examined is, whether the matters set up in answer to the second count are liable to the objections of being irrelevant, impertinent or scandalous. That the answer is good, so far as relates to the justification of stealing the gold pen and pencil, can not admit of doubt, as it directly meets an averment in the complaint. But the plaintiff's counsel seems to suppose that the defendant is not at liberty to rely on other instances of theft. In this, I think he is mistaken, as will appear from a brief reference to the legal principles governing actions of slander.

The second count contains *three* sets of actionable words, if they are properly pleaded. The first are, "Susan Mary has robbed me;" the second, "she is a thief;' the third, "she has stole my spoons and gold pen and pencil." If, on the trial, the plaintiff should prove that the defendant uttered any one of these phrases, a cause of action will be made out. Hence it follows that the defendant must be permitted to justify every set of words which constitute a cause of action; and if she can not justify all the actionable words, she may justify such part and so many of them as she may be able. Now suppose a not uncommon case, for the sake of illustration, that, on the trial, the plaintiff should succeed in proving only the words "she is a thief," which would maintain the action; and supposing too, that the defendant, although unable to justify the unproved words in relation to the "gold pen and pencil," should be able to prove that the plaintiff *was a thief*, by showing instances of larceny, is she not to be allowed the privilege? Certainly she is. But if so, she must set forth in her answer the facts constituting the larcenies; for another well settled rule of law intervenes, requiring a justification to be pleaded as well as proved, with great particularity and precision.

The defendant has merely complied with this rule by setting forth in her answer, with about as much certainty and particularity as is required in an indictment, the various larcenies on which she relies to sustain the epithet "thief," which she applied to the plaintiff; and in my opinion they are pertinent and are stated in a proper and legal manner.

If the plaintiff had been contented to count only on the last set of words, omitting those touching robbery and theft, as she might have done, the defendant would have been confined, in her justification to the larceny of the pen and pencil. But as the plaintiff has seen fit to include in the complaint the general charge of theft, she has opened the door to the admission of any and every larceny which the defendant can prove upon her.

The motion must, therefore, be denied, with $10 costs.

COURT OF APPEALS.

GRACE R. FERGUSON respondent agt. JAMES FERGUSON appellant.

Where a *return* to this court contained the *cases* made, upon which the first two verdicts upon the trials of the feigned issue ordered by the late Court of Chancery, were set aside, and new trials granted, and all the *evidence* embraced in those cases, in addition to the case, evidence and bill of exceptions upon the third trial, in which a final decree was ordered—*Held*, that such a return should not be tolerated. To allow it, would sanction a precedent which sets all form and order at defiance.

September Term, 1852. *Motion by respondent to dismiss the appeal in this action.* The facts of the case sufficiently appear in the opinion of the court.

JAMES R. WHITING, *Attorney*, and
——— ———, *Counsel for Respondent.*

JAMES FERGUSON, *Attorney in person*, and
——— ———, *Counsel for Appellant.*

By the Court, EDMONDS, J.—This was an action for divorce, commenced in the late Court of Chancery. A feigned issue was

awarded and three several trials of that issue were had, and on each trial the verdict was against the defendant. After the last verdict, the defendant moved for a new trial, which was denied by the Superior Court in New York and a decree entered awarding a divorce. From that decree the defendant now appeals, and in the return to the appeal, he has brought up the pleadings in the original suit, the feigned issue, the case on which the first verdict was set aside, and the bill of exceptions on which the court refused to set aside the third verdict. These several cases, and the bill of exceptions are nothing more than the judge's notes of the evidence given by the witnesses in the several trials.

In addition the return contains the opinion of the judge on granting the third new trial, and the opinion of the court denying the motion for a fourth new trial. It contains the feigned issue three times, and the judge's charge to the jury on each of the several trials, and several affidavits, certificates, letters and papers, which have nothing to do with the question before us, and which seem to have been introduced merely for the purpose of enabling the defendant to vent his ill humor against his wife's counsel.

Nothing could be more inartificial and irregular than the manner in which the return is made up, and a large mass of irrelevant matter is stuffed into it. In a printed book of 116 pages, at least 70 pages are filled with entirely irrelevant matter.

The return contains what purports to be a bill of exceptions on the last trial; but it has no other characteristic of a bill of exceptions than the conclusion and the judge's signature. Otherwise it is nothing more than the judge's minutes of the testimony given on the trial and his charge. Twenty-five printed pages are occupied with what might be stated in two or three.

The irregularity of the whole return is so gross that it can not safely be tolerated. To allow it would sanction a practice which sets all form and order at defiance.

The motion to dismiss the appeal ought, therefore, to be granted, but without prejudice to the defendant's appealing again, when he can get the record below in such a form as properly and orderly to present to us the questions of law, if there are any, on which this court can be required to pass.

The court order as follows:

A motion having been made to dismiss the appeal in this case, and having heard the counsel for the respective parties, it is ordered that the said motion be and the same is hereby granted, unless the appellant shall in forty days after notice of this order, cause a new return to the same to be filed with the clerk of this court, omitting the cases made upon which the first two verdicts upon the trials of the issues ordered by the late Court of Chancery in this suit were set aside and new trials granted, and all the evidence embraced in said cases, and pay to the respondent ten dollars costs of this motion; and in that event that the said appeal retain its present date with a view to its future place upon the calendar.

COURT OF APPEALS.

LIVINGSTON appellant agt. MILLER respondent.

Where it appears that certain questions of law were actually and distinctly presented by exceptions taken at the trial, and were decided upon the bill of exceptions as settled at the general term of the court below, although said questions do not *sufficiently appear* by the said bill of exceptions, this court will, on motion, stay the argument of the cause, to give the appellant an opportunity to apply to the court below, at general term, for a resettlement according to the facts.

And the return made to this court, after amendment of the exceptions, will be allowed to retain its original date of filing.

September Term, 1852. This was an action by Livingston, the plaintiff, against Miller, for the amount of rent accrued upon two leases. The cause was tried at the Columbia circuit, on the 14th June 1849, before Mr. Justice PAIGE, and a jury. A verdict was found in favor of the plaintiff of $36·89. On the 15th July 1849, the bill of exceptions was settled by the justice who tried the cause. And at the foot of the exceptions the following sentence appears: "To which charge, and to every part thereof, the counsel for the plaintiff excepted." The general term of the Supreme Court, third district, denied a new trial, and judgment for costs was entered in favor of the defendant August 3, 1850.

The plaintiff's attorneys state that exceptions were actually and specifically taken on the trial, naming them, which do not appear in the bill as settled; and that previous to this motion they proposed to defendant's attorney, in writing, to allow an amendment of the bill of exceptions incorporating such as they claimed were left out, and that such proposition was declined. That not until last June were they aware that this court had changed the practice in regard to exceptions, requiring them to be separately taken.

R. B. & C L. MONELL, *Attorneys*, and
HENRY HOGEBOOM, *Counsel for Appellant.*
WM. ENO, *Attorney*, and
N. HILL JR., *Counsel for Respondent.*

Mr. HILL insisted that the only remedy of the appellant was to discontinue the present appeal. He could then apply in the court below to set aside the judgment, and allow the bill of exceptions to be amended; and if the application was granted, the cause should be reheard in that court upon the amended bill, and a new judgment entered. The practical result of the present application, if successful, will be, that the cause will be heard in this court upon a bill of exceptions which the court below have never passed upon or seen. *Non constat* that they did not understand the law in respect to the sufficiency of the exceptions, precisely as settled by this court, and gave judgment on that ground. If so, and the bill of exceptions is hereafter amended so as to take away that ground, the judgment may be reversed here, though in strict accordance with the law when rendered. In any view of the matter the cause should be here upon the identical record which was before the court below.

The Court granted the motion of the appellant in the following form.

It being alleged on oath, on the part of the appellant, that certain questions of law were actually and distinctly presented by exceptions taken at the trial in this cause and were decided upon the bill of exceptions in this cause as settled, at the general term of the Supreme Court, on the rendering of the judgment appealed from, although the said questions do not sufficiently

appear by the said bill of exceptions; and on hearing Mr. Hogeboom for the appellant, and Mr. Hill for the respondent, it is ordered that the argument in this cause be stayed until the next January term of this court, to enable the appellant to apply to the said Supreme Court in general term, for leave (in case they shall find said allegations of the appellant to be true, and shall deem it meet to grant such leave, to have said bill of exceptions resettled, as of the day of the original settlement thereof before the justice who presided at the trial of this cause, so as to present those questions of law which were actually made at the trial by exceptions there duly taken, and which, upon the said bill as settled, were passed upon at said general term; and in case the said bill shall be so resettled, it is further ordered that the return on file in this cause in this court be taken from the files to be amended accordingly, and be refiled as of the day of its original filing. And it is further ordered that the appellant do pay to the respondent ten dollars costs of opposing this motion.

SUPREME COURT.

TRUSCOTT agt. DOLE.

The words "as the plaintiff is informed and believes," where they occurred in the complaint (sworn to), *Held*, to be redundant, and were stricken out.

Allegations in a pleading should be *positively* made, in order to prevent immaterial issues and confusion (*see* § 141 *of the Code, as to the form of a pleading*).

The allegation of a fact, positively, in a pleading never, of itself, indicated that the party was *personally* cognizant of it. There was the same reason for inferring that he stated it on information, that there was for supposing that it was stated upon personal knowledge.

The present statutory affidavit (*Code*, § 157) does not necessarily imply that it appears in the pleading what matters are stated on personal knowledge and what on information and belief.

The effect and true construction of the oath, is, that so far as the matters in the pleading are within the knowledge of the party, they are true, and as to the residue he is either informed or believes them to be true.

Niagara Special Term, February 1851. This was a motion to strike out of the complaint certain matter as redundant. The

main question is whether the complaint should contain a statement that the allegations are made on the *information* and *belief* of the plaintiff? The motion is to strike out such allegations, and others, as redundant.

DYER TILLINGHAST, *for Plaintiff*
JOHN GANSON, *for Defendant.*

SILL, Justice.—At common law it was never allowable to set forth in the pleading that any facts were stated upon information or belief. Such was not, originally, correct practice in drawing a bill in equity. It will be found that the English and American precedents at an early day, contained no statement of this kind.

As a mere pleading it is utterly immaterial whether the matters stated are, or are not, within the knowledge of the party. He has as good right to state matter upon information or belief, as the basis of his action, or defence, as he has, that which he knows to be true, and whether he does or not, is a circumstance never heeded on a trial.

The chapter of the Code relating to complaints, requires that such facts only as constitute the cause of action shall be stated; that, of course, excludes the unimportant statement as to their being within the pleader's personal knowledge.

The Code, as originally adopted, required the pleading to be verified by the party, his agent, or attorney, to the effect that he believed it to be true (*Code of* 1848, § 133). Under these provisions there can be no room for doubt that a statement, in the complaint, that the allegations in it were on information and belief, would have been held redundant.

The sole argument in favor of allowing these statements in the complaint, grows out of the amendment of the 133d section, above cited, which is the 157th of the Code, as amended in 1849. The section now requires, that in the affidavit, verifying a pleading, "the party shall state that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and, as to those matters, he believes it to be true." It is supposed by the plaintiff's counsel, that this form of verification renders it indispensable that it should appear in the complaint, what matters are stated upon the knowledge

of the party, and what upon information or belief. This, it is said, is the form of the jurat prescribed by the late chancellor, and implies that the pleadings are to take a form to which it was adapted.

I shall have occasion to remark upon a difference between the affidavit under the Code and the chancellor's jurat; but, for the present, assuming that they are the same, there are several considerations which induce me to believe that the form of pleading was not designed to be changed by adopting section 157 in its present amended form. To give it this effect, it must be construed as amending, by implication, section 141, which prescribes the manner of framing a complaint.

The great and leading object of the Code was to provide a new mode and form of pleading. This is its leading feature. Its other provisions are subordinate to those relating to pleading, and are generally introduced with a view to adapt the practice to the new and improved mode of pleading. If the legislature had entertained the design of amending, or qualifying section 141, we should have expected it to do this directly, by changing the phraseology of that section; and we should not, if it can be avoided, work this effect constructively in giving interpretation to a section relating to a matter wholly subordinate to that of pleading, and comparatively of minor consideration.

The 128th section of the Code, as originally passed, provided that the answer should contain,

1st. A denial of the allegations of the complaint, or of any knowledge, sufficient to form a belief.

2d. A statement of new matter constituting a defence, &c.; but in neither subdivision was there any provision for a direct statement of new matter upon information or belief.

The first subdivision of this section was amended in 1849, providing that the denial of the allegations of the complaint might be made upon information and belief (§ 157). But this amendment was not extended to any other provision relating to the mode of pleading.

It appears that the legislature had before it the subject of permitting statements in pleadings upon information and belief, and provided for it in the particular instance stated. To introduce

it by construction into other parts of the statute governing pleadings, under the circumstances, seems inadmissible. Obviously, the amendment of section 157 was never intended to operate as a constructive amendment of section 141, and it should not be interpreted so as to work that result, if effect can be given to it in any other way.

The jurat prescribed by the chancellor was a *direction* to the officer who took the oath of the party, as to the form in which the party should be sworn. It was not an *affidavit*, but an official certificate that the bill, or answer, had been verbally verified in the mode required by the rule of the Court of Chancery. The certificate, of course, contained no more, nor less, than the rule prescribed.

But now the party signs the affidavit, and the ordinary oath, that its contents are true, is administered, and the common jurat is added by the officer. The statute says the matter which has been quoted from section 157 shall be in the affidavit, but not that this shall, as in the case of the chancellor's jurat, constitute the whole of it. If it be necessary to show any where what matters are stated in the complaint on the knowledge, or otherwise, of the party, it is competent to subjoin, to the other matters required by the act to be contained in the affidavit, a statement making the requisite explanation.

I am not, however, prepared to say that it is necessary that it should appear any where whether the averments in the pleadings are upon the parties' own knowledge. No important results can flow from such a disclosure, except it be to furnish facilities for detecting and punishing perjury, if it should be committed in verifying pleadings. But such is not understood to have been the design of the amendment of 1849. As the Code was, the verification might be made either by the party, or the attorney, and the objects of the verification were frequently evaded, and its proposed benefits lost, on account of the loose and unguarded provisions of the act of 1848. The objects of the amendment are understood to have been to require the oath to be made by the party, unless some good reason was shown for receiving the verification of another person; and also to prescribe a form which would more effectually direct the attention

of the deponent to the matter which he was verifying, and thus more effectually awaken his conscience to the responsibility and solemnity of the duty he was performing.

I repeat that I can find no reason for supposing that the legislature had in view by the amendment the detection and punishment of perjury. At all events, no such object is accomplished by it. If the party is to show in the pleading itself what matters are stated on his personal knowledge, and what upon his information and belief, it is still optional with the pleader in which mode his allegations shall be made. He has as good a right to make allegations, of the truth of which he knows nothing, as those of which he has personal cognizance. He might even state those of the latter class upon belief, and under this view of the case, the pleading is equally good, and he could not be compelled to change it. The legislature, therefore, never supposed that a man of intelligence enough to be held responsible for the commission of crime, would state a falsehood as within his own knowledge, when it would answer his purposes equally to allege his belief of the fictitious averment.

I have, therefore, been unable to discover any practical efficacy that can arise from its being shown either in the pleading or affidavit, how far the party has personal knowledge of the facts alleged in the complaint (see Milliken agt. Carey, 5 *How. Pr. R.* 272).

The allegation of a fact, positively, in a pleading never, of itself, indicated that the party was personally cognizant of it. There was the same reason for inferring that he stated it on information that there was for supposing that it was stated upon personal knowledge. On this point the positive statement indicated nothing, and the ordinary oath that the pleading was true, was not construed (I speak of pleadings only) as an oath that the facts were within the pleader's personal knowledge. It was understood that the party could properly make the oath if the matter of fact was honestly stated upon information or belief. The verification of a plea in abatement under the former practice, is a familiar example of this kind (see 5 *Hill*, 611).

The necessity of introducing into a mere bill in equity, a statement that certain allegations were made on information and

belief, arose when the late chancellor required the party to swear that the matters were true "*of his own knowledge*," except those stated *in the bill to be* on his information, &c. In this particular the present affidavit, under section 157, differs from the jurat in the late Court of Chancery, The words "to be," are now omitted, so that the present statutory affidavit does not necessarily imply that it appears in the pleading what matters are stated on personal knowledge, and what on information and belief. By a literal construction of the affidavit the party does not swear that what is positively stated in the pleading is on his own knowledge. The pleading may contain various allegations, all in form positively stated, yet, as has been said, this does not show whether they are, or are not, within the pleader's personal knowledge. A part may be upon information and belief. The effect and true construction of the oath, therefore, is that so far as the matters in the pleading are within his knowledge, they are true, and as to the residue he is either informed, or believes them to be true.

Thus in every pleading, by honest and conscientious men, good faith is secured, which I understand to be the object proposed to be achieved in requiring pleadings to be verified. In prescribing what shall be contained in the affidavit, the legislature have departed from the old form of the jurat in equity, in a particular which necessarily changes its import; for which I have been unable to discover any reason unless it is to adapt the verification to the form of pleading unquestionably prescribed by section 141. This change should not be permitted to create a constructive qualification and amendment of section 141, for, I think, full effect can be given to section 157 without its making this mischief.

Again, unless I am right in the view above taken, a different form must be used in pleadings that are verified from that used in those that are not verified. For this it can not be claimed there is any warrant in the Code.

The words, "as the plaintiff is informed and believes," where they occur in the complaint, are redundant and must be stricken out.

In the present case it is of very little consequence whether these words are stricken out, or retained. But I deem it an im-

portant question in pleading, in its general application, whether allegations are to be positively made, or upon information and belief. Through the inattention of pleaders, immaterial issues are presented and frequently made upon these statements, and confusion is the almost invariable fruit of this mode of pleading. I have, therefore, applied what I believe to be the true rule to the present case.

There are some other statements which the defendant moves to strike out as redundant. These, it is not seriously contended, should be retained, and do not, therefore, require special notice.

The motion is granted; but, as there is a slight error in the notice, in specifying a part of the redundant matter, it is without costs.

NOTE.—This case came from a highly respectable member of the Bar of Buffalo; with the information, that subsequent to the death of Judge SILL, he had learned that it was his original intention to have it published.

It will be read with interest, like all similar productions from that accomplished and lamented judge.

SUPREME COURT.

SMITH agt. WAITE.

An answer to a complaint for breach of marriage promise, can not set out, in mitigation of damages, that between the alleged promise and breach, the plaintiff's conduct was improper, indecent and criminal, &c. Such facts can not now, any more than before the Code, be *pleaded*.

If admissible in evidence at all, they may be proved without being pleaded.

Albany Special Term, 1852. *Motion to strike out a part of defendant's answer as irrelevant or redundant.* The action is for a breach of promise of marriage. The defendant denies the promise, and then alleges that the plaintiff, if he ever did promise, had absolved him from its performance.

The answer then proceeds to state, that between the time of the alleged promise and its breach, the plaintiff's conduct was "improperly indelicate, and that she was habitually, during that

period, accustomed publicly to use coarse, vulgar and indecent language, and to conduct herself in an improper, indecent and criminal manner, by means of which her reputation was greatly injured, and she thereby rendered an unfit consort for the defendant." It is then alleged that after this conduct came to the defendant's knowledge he never gave or paid her any further attention. All this the defendant alleges by way of mitigating any damages the plaintiff may prove. This part of the answer the plaintiff moves to strike out.

D. Buel Jr., *for Plaintiff.*

J. Pierson, *for Defendant.*

Harris, Justice.—The defendant concedes that the matter embraced in this motion does not constitute a defence to the action. All he claims is, that the facts alleged may be proved in mitigation of damages. This may be so; but such facts can not now, any more than they could before the adoption of the Code, be pleaded. In a single instance mentioned in the 165th section of the Code, mitigating circumstances may be stated in an answer; but the very fact that the legislature have thought proper to allow this to be done in one case, shows that no change of the general rule of pleading, in this respect, was intended.

The Code authorizes the defendant to plead any new matter constituting a defence. It is but an enactment of the common law rule on the subject. But here the matter in question, confessedly, does not constitute a defence. It admits a cause of action, but alleges that the plaintiff has not suffered as much damage as she would if her character had been better. How is the plaintiff to meet such a pleading? If she omit to answer it she is to be deemed to have confessed the facts stated. If she denies it, she makes an issue upon a question which goes only to the amount of damages, and not to the merits of the action.

Nor is there any necessity of pleading such matter. If admissible in evidence at all, it may be proved without being pleaded (Wilmarth vs. Babcock, 2 *Hill*, 194; Graham agt. Stone, 6 *How. Pr. R.* 15). This part of the answer, therefore, is clearly redundant if not irrelevant, and the motion must be granted, with costs.

SUPREME COURT.

STOUTENBURGH agt. VANDENBURGH AND STOUTENBURGH.

NINE OTHER SUITS agt. THE SAME DEFENDANTS.

A judgment by confession, without action, can only be entered against the person who signs the confession. One of two partners, or joint debtors, can not confess judgment for both. Such judgment is probably valid as against the party signing, but is void as against the other defendant, and can not not be enforced against the joint property.

In effect the party confessing such a judgment, makes the debt, by his confession, his individual debt.

Where after the confession of such a judgment by one partner, a suit was commenced and judgment *regularly* obtained against both on the same cause of action, and also upon a promissory note, not included in the former judgment, *Held*, on a question of priority of liens, that other judgment creditors could not avail themselves of the objections that a former recovery had been obtained and that the said note did not belong to the plaintiff.

Had the judgment been obtained by fraud or collusion, it would have been competent for them to have avoided it on that ground.

Before an execution can be regularly issued to any county, the judgment should be docketed in such county. *It seems*, however, that an execution against personal property only, would not be irregular, though the judgment were not docketed in the county to which it was issued.

A judgment was perfected in Columbia county, and a transcript sent to the clerk, and execution (against both real and personal property) to the sheriff of Greene county, on the same day, but the execution was received one day before the transcript was docketed, *Held*, that the execution became operative in the hands of the sheriff from the time the judgment was actually docketed in Greene county, and took priority from that time.

The provisions of the Code relating to attachments are applicable to one of several joint debtors; but the statute does not authorize the joint property of several defendants to be seized upon an attachment against one of them. It is only his individual interest that is liable to such seizure.

Albany Special Term, 1852. *Priority of liens.* The defendants Vandenburgh and Stoutenburgh were partners in trade, doing business at Coxsackie. Shortly before the 11th of November 1851, Vandenburgh absconded. On the day last mentioned, Stoutenburgh confessed a judgment in favor of Walton S. Stoutenburgh, pursuant to the 382d section of the Code, for $630·05. Judgment was entered in form against both partners. On the

same day an execution was issued and levied upon the partnership property. On the 13th of November, Journeay & Clark, holding a debt of $1080 against the partnership, procured an attachment against Vandenburgh, as an absconding debtor, which was levied upon the interest of Vandenburgh in the partnership property. The summons and complaint in the same action was served upon Stoutenburgh. The summons was served on Vandenburgh by publication. On the 15th of November, Compton & Turner, having a debt of $1181·23 against the partnership, also obtained an attachment against Vandenburgh, by virtue of which Vandenburgh's interest in the goods was seized. The summons in this action also was served by publication against Vandenburgh, and personally on Stoutenburgh. On the 17th of November, Kirtland & Barker entered a judgment against both partners upon the confession of Stoutenburgh, without action, for $137·74. On the 16th of December, Walton S. Stoutenburgh recovered in an action brought against the partners, in which the summons was served upon Stoutenburgh alone, a judgment for $788·90. This judgment was upon the same debt for which the judgment by confession had been taken, and also a note of $150, which had not been included in that judgment. On the 25th of December the Tanners Bank recovered a judgment against the partnership, upon service of the summons and complaint on Stoutenburgh alone, for $312·77. On the 30th of December, the Hudson River Bank recovered two judgments in the same manner against the partnership, one for $320·27, and the other for 370·21. On the first day of January 1852, George Reed and others recovered a judgment by confession, without action, for $506·25. This judgment, though the confession was by Stoutenburgh alone, was entered in form against both partners. On the 1st of January 1852, The Catskill Bank recovered a judgment against the partnership for $1311·60, upon service of the summons and complaint on Stoutenburgh alone. Executions were issued upon all these judgments on the same day on which they were recovered, and levied upon the goods of the partnership. The transcripts of the judgments in favor of the Hudson River Bank, were not filed in the office of the clerk of Greene until the first day of January, though the executions were de-

livered to the sheriff on the 31st of December. The sheriff sold the property upon which he levied, on the 10th of January. The proceeds amount to about $2500, which sum he holds subject to the order of the court, determining the priority of the liens thereon.

K. MILLER, *for attaching creditors.*
H. HOGEBOOM and J. C. VAN DYCK, *for W. S. Stoutenburgh.*
J. POWERS, *for Tanners Bank and Catskill Bank.*
J. H. REYNOLDS, *for Hudson River Bank.*

HARRIS, Justice.—At common law, a plaintiff could only proceed against a joint debtor, not served with process, by outlawry. The authority to enter judgment against any person not so served, is derived from statute. It is provided by the 136th section of the Code, that when an action is brought against several persons jointly indebted upon contract, the plaintiff, if the summons has been served on one or more, but not on all, may enter judgment against all the defendants, and enforce it against their joint property. The same provision is found in the Revised Statutes (2 *R. S.* 377). But this authority is only given in cases where an action has been commenced. Process must have been served upon one or more of the joint debtors before such a judgment can be entered. A judgment may be entered by confession, without action; but such a judgment can only be entered against the person who signs the confession. Three of the executions against these defendants were issued upon judgments confessed by Stoutenburgh alone. They are probably valid as against him, but they are void as against Vandenburgh. The partnership effects are not liable for the satisfaction of such judgments. All that the sheriff could legally sell upon these executions was the interest of Stoutenburgh in the surplus, after the partnership debt should be paid. In effect, he made the debts, by his confession, his individual debts (Crane vs. French, 1 *Wend.* 311; Grazebrook vs. McCreedie, 9 *Wend.* 437).

On the other hand, the judgments entered in the suits in which Stoutenburgh had been, in due form of law, brought into court, are sustained by the provisions of the statute, and the executions, when issued and levied, became a lien upon the joint property of the defendants (Pardee vs. Haynes, 10 *Wend.* 631).

It was insisted upon the argument that the judgment recovered by Walton S. Stoutenburgh, in the action brought by him, was void, on the ground that a part of the notes upon which that judgment is founded had been included in the judgment by confession, and that, though the plaintiff was liable as endorser, upon the $150 note included in that judgment, it was still held by the Tanners Bank. But I do not think this objection is available to the plaintiffs in the other executions. It may be, that, if Vandenburgh had been sued, he might have set up by way of defence to the action, that a prior judgment had been obtained against Stoutenburgh individually for a part of the same debt, and that the residue of the debt belonged to the Tanners Bank. However this might have been, I do not see that the other creditors can be permitted to make this defence for him. Had the judgment been entered by fraud or collusion it would have been competent for them to have avoided it on that ground. But this is not pretended. The debts upon which the judgment was recovered were, it is to be assumed, valid debts against the partnership. And though a state of things appears which might have furnished Vandenburgh a technical legal defence to the action, it is apparent that substantial justice is done by allowing the judgment to be enforced. As against these creditors, it is to be presumed that the judgment was regularly recovered, and upon a valid indebtedness.

A question has also been raised between the Hudson River Bank and the Catskill Bank, as to the priority of their executions. The Hudson River Bank judgments were entered in Columbia county, on the 30th of December. A transcript was, on the same day, forwarded to the clerk of Greene, with directions to docket the judgment in that county. On the same day, an execution was forwarded to the sheriff of Greene. The execution was received on the 31st of December, but the judgment was not docketed in that county until the 1st day of January, at 10 oclock A. M. The execution in favor of the Catskill Bank was issued on the same day, at 11 o'clock A. M., the judgment having been docketed at 10½ A. M. of the same day.

The 287th section of the Code authorizes an execution against the property of the judgment debtor to be issued to the sheriff of

any county *where the judgment is docketed.* It was held in Stephens vs. Browning (1 *Code Rep.* 123), that notwithstanding this provision, an execution against personal property merely, might be issued to any county, though the judgment had not been docketed there. There is certainly some plausibility in the distinction taken in the case referred to, between an execution against personal property and one which requires the sheriff to satisfy the judgment out of real as well as personal property. There is really no connexion between the docketing of the judgment and the lien upon personal property which is acquired only by a levy. But I very much doubt whether the legislature contemplated any such distinction. I am inclined to think that a true construction of the section referred to requires that before an execution can be regularly issued to any county, the judgment should be docketed in such county. It may be that an execution, against personal property only, would be regular. I think it should be so held. Nor will I say that it should be held to be irregular to issue such an execution to a county where the judgment had not been docketed. But I think it very clear that the legislature had no reference to such an execution.

But however this may be, I think the Hudson River Bank executions became operative in the hands of the sheriff from the time the judgments were actually docketed in Greene (Clute vs Clute, 4 *Denio*, 241; Walters vs. Sykes, 22 *Wend.* 566). As they were thus docketed before the Catskill Bank judgment was entered, the executions upon these judgments are entitled to priority.

The only question that remains relates to the effect of the attachments issued in favor of Journeay & Clark and Compton & Turner. These attachments were regularly issued. There can be no doubt, I think, that the provisions of the Code relating to attachments are applicable to one of several joint debtors. To the extent, therefore, of the property liable to seizure upon those attachments, the plaintiffs therein acquired a priority over judgments subsequently recovered. But the statute does not authorize the joint property of several defendants to be seized upon an attachment against one of them. It is only his individual interest that is liable to such seizure. That interest the plaintiffs in

the attachments have a right to hold as security for the satisfaction of their judgments, when recovered. This right in the present case, proves to be valueless. Other creditors have acquired a lien upon the interest of one of the partners merely, but upon the partnership property to the full extent of its amount; so that the interest of Vandenburgh, which was all that could be held under the attachments, is worthless.

An order must be entered declaring the rights of the parties, and directing the application of the moneys, upon the principles above stated. The motion does not present a proper case for charging any of the parties with costs. (*a*)

(*a*) This order was subsequently affirmed upon appeal to the general term.

SUPREME COURT.

BATES agt. VOORHIES.

Leave will not be given to amend a pleading for the purpose of setting up the defence of usury.

Albany Special Term, September 1852. *Motion for leave to amend the defendant's answer, by adding the defence of usury.* The action is upon a note for $2500, made by one Tomlinson, and endorsed by the defendant. Tomlinson died before the note became due. The answer sets up various grounds of defence, and the cause having been referred, several hearings have been had before the referee. The defendant states that a witness called by the plaintiff, while being cross-examined, on the 3d of April, disclosed facts of which he was before ignorant, and which, as he is advised by his counsel, show that the note was discounted by the plaintiff at an usurious interest. He therefore moves to amend his answer by adding this defence. Affidavits were read on the part of the plaintiff, for the purpose of showing that there was no usury in the transaction.

HARVEY J. KING, *for Plaintiff*
R. W. PECKHAM, *for Defendant.*

HARRIS, Justice.—Courts in the exercise of their discretion in allowing amendments, have thought it proper to discriminate between what have been regarded as hard and unconscionable defences, and such as have been considered with more favor. The soundness of this discrimination may well be doubted. The legislature of this state, have thought it wise to declare usury to be a legal defence to an action upon the usurious contract. In doing so, they have but followed every other civilized state. With the policy of such laws, courts have nothing to do. When a plaintiff willfully violates the law, by taking a greater amount of interest than it allows, I do not see upon what principle a court should take it upon itself to pronounce the defence, with which the law has provided the defendant, hard or unconscionable. But such has been the practice, and perhaps that practice has now become so inveterate that it can not be disregarded.

The defence of usury has been put upon the same footing with the statute of limitations. If any thing, it has been regarded as still more unconscionable (Lovett vs. Cowman, 6 *Hill*, 223). In Hallagan ads. Golden (1 *Wend.* 302), Savage, Ch. J., said a plea of the statute of limitations is never allowed to be added to the defence after issue joined" (see also Jackson vs. Varick, 2 *Wend.* 294; Fox vs. Baker, *id.* 244; Beach vs. Fulton Bank, 3 *id.* 585). The same rule is applied to cases in which the defendant seeks to amend by adding the defence of usury (Utica Ins. Co. vs. Scott, 6 *Cow.* 606; Lovett vs. Cowman, above cited). In these cases, a distinction is taken between opening a default, so as to allow a defendant to avail himself of an unconscionable defence already interposed, and amending a plea, after issue joined, so as to add such a defence. The ground of such a distinction is not very obvious, but it seems to be established.

Nor can I find that, in the application of this rule, any exception has been made in favor of endorsers or sureties. In one of the cases above cited (Utica Ins. Co. vs. Scott), the defendant was an endorser, and yet the court said, "we agree that we will not allow a new defence which is unconscionable." I feel bound, therefore, in regard to what seems to be the settled practice of the court, to deny the motion, but it is without costs.

SUPREME COURT.

MAXWELL agt. FARNAM.

A complaint is bad on demurrer which alleges the taking, detention and *conversion* of personal property and claims not only damages for the conversion, but also a redelivery to the plaintiff.

A plaintiff can not so frame his complaint as that if he fails to recover the possession of the property, he can recover damages for the conversion.

Albany Special Term, 1852. *Demurrer to complaint.* The complaint alleges that the defendant has become possessed of one hand knitting machine, the property of the plaintiff, by wrongfully taking the same from the plaintiff, and that he wrongfully detains the same, and has converted it to his own use; and demands that the defendant may be adjudged to pay him damages for the wrongful taking, detention and conversion; and that the property may forthwith be delivered to the plaintiff.

The defendant demurred to the complaint, assigning for cause that two causes of action are improperly joined.

J. F. CRAWFORD, *for Plaintiff.*

J. W. MILLER, *for Defendant*

HARRIS, Justice.—The pleader who drew this complaint could not have had before his mind, at the time, the distinctive character of the different actions relating to personal property. Hence it is, that we find blended together allegations which constitute the peculiar elements of several kinds of actions. The complaint commences by alleging a *wrongful taking* of the property. This is an allegation appropriate to an action for trespass *de bonis asportatis*, or replevin in the *cepit*. Then, a wrongful *detention* is alleged. This is a proper allegation in an action of replevin in the *detinet*. And, lastly, a *conversion*; this is the indispensable characteristic of the action for *trover*. Taking, then, the allegations of the complaint as the criterion, what is the nature of this action? Is it trespass, or replevin, or trover? There is certainly enough in it to sustain either. It may be referred to

the *third* or the *sixth* class of actions, as defined by the 167th section of the Code, equally well.

But it has been said that it is the relief sought, which determines the character of the action (Spalding agt. Spalding, 3 *How. Pr. R.* 297; Dows agt. Green, *id.* 377); and to this I agree. But when we appeal to this test, we find equal difficulty in determining whether the action is *trover* or *replevin*. The plaintiff asks that the defendant may be adjudged to pay damages for the wrongful taking, detention and *conversion* of the property to the amount of one hundred dollars, the whole value, as stated in the complaint, being but ninety dollars; and then further asks that the property may be forthwith delivered to the plaintiff. Here, again, the action is presented in its two-fold character. The judgment for which the plaintiff asks is a judgment in *trover*, and also a judgment in *replevin*. He seeks to recover *the property itself*, and then, damages for its *conversion*. Thus, throughout, in its allegations of fact, and in its prayer for relief, the complaint presents the complex form of an action for trover, and an action of replevin. The complaint is, therefore, liable to the double objection that it contains two causes of action, belonging to different classes, and also that those two causes of action are improperly united in a single count. For different causes of action, even when they may be united in the same complaint, must be "separately stated" (see Durkee agt. Saratoga and Washington R. R. Co., 4 *How. Pr. R.* 226).

It was urged upon the argument that the allegation of the *conversion* of the property and the prayer for damages for such conversion, are matters of form and should be disregarded. But it seems to me that these are to be regarded also as matters of substance, as much as any thing else in the complaint, The plaintff, to avoid all difficulty, should have stated the facts as he expected to present them in proof, and should then have asked for the same judgment which he expected to have awarded to him upon establishing the facts alleged.

If the property had in fact been *converted* by the defendant, so that it was no longer in his possession, or under his control, that fact would, I suppose, be a complete answer to an action for the recovery of its possession. If a party intends to recover the

possession of his property, he can only succeed by bringing his action against the party who has in his power to give him such possession. The party who has been guilty of the conversion may be liable for the damages, but is not liable in an action to recover the possession (Roberts agt. Randall, 5 *How. Pr. R.* 327). But I know of no principle of pleading which will allow a plaintiff so to frame his complaint, as that, if he fails to recover the possession of the property, he can recover damages for the conversion. He must elect, when he brings his action, whether he will claim a judgment for the delivery of the *identical property*, or for the *damages* he has sustained by reason of the conversion.

There must be judgment for the defendant upon the demurrer, but with liberty to the plaintiff to amend on payment of costs.

SUPREME COURT.

The Western Bank agt. The City Bank of Columbus.

A foreign corporation is not authorized, either by the Revised Statutes or the Code, to sue another foreign corporation in the courts of this state, by attachment, unless the cause of action has arisen, or the subject of the action is situated within this state.

Where a loan is made by one non-resident to another, out of this state, and secured by a draft drawn upon a person residing within this state, the cause of action can not be said to have arisen within this state.

New York Special Term, 1852. *Motion to discharge an attachment.* The parties are both foreign corporations. The plaintiffs lent to the defendants the sum of ten thousand dollars, and to secure the payment of the same, a bill of exchange was given, drawn upon a person residing in the city of New York.

F. F. Marbury, *for the Motion.*

—— ——, *Opposed.*

EDWARDS, Justice.—The Code of Procedure provides that an action against a corporation, created by or under the laws of any other state, government or country, may be brought in the Supreme Court, 1st. By a resident of this state for any cause of action. 2d. By a plaintiff not a resident of this state when the cause of action shall have arisen, or the subject of the action shall be situated within this state (§ 427).

The plaintiffs in this suit being a foreign corporation, can not by the provisions of *this* statute sue the defendant, being also a foreign corporation, unless the cause or subject of the action is of the character above stated. It is said, however, that under the Revised Statutes the plaintiffs have a right to sue the defendant in this suit, without reference to the place where the cause of action may have arisen, or the subject thereof may be situated. The statute relied upon provides that a foreign corporation, created by the laws of any other state or country may, upon giving security for the payment of the costs of such suit, prosecute in the courts of this state in the same *manner* as corporations created under the laws of this state (2 *R. S.* 457, § 1). But it does not say that a suit may be brought here by a foreign corporation against the same *parties* as could be sued here by a corporation created under the laws of this state. The Revised Statutes also provided that suits brought in the Supreme Court by a *resident* of this state against any corporation created by or under the laws of any other state, government or country, for the recovery of any debt or damages might be commenced by attachment (2 *R. S.* 459, § 15; 6 *Hill*, 297). A corporation created under the laws of another state is not a resident of this state, and no possible reason can be assigned why a foreign corporation should be placed upon a better footing than a non-resident individual. The fact that a foreign corporation is obliged to give security for costs can not be any reason for such a distinction; for a non-resident individual plaintiff may be compelled at any time in the progress of the suit to give the same security.

The next question is whether the cause of action arose here? The complaint states that the plaintiffs lent to the defendants the sum of ten thousand dollars, and to secure the payment of the same gave a bill of exchange, drawn by certain persons whose

names are mentioned, upon a person residing in the city of New York. It is not alleged or pretended that the loan, which is the cause of action, was made here. As the plaintiffs have no right to sue the defendant in this state the attachment must be discharged.

COURT OF APPEALS.

Miscellaneous Practice at the Terms of the Court, not included in the Rules.

All the terms are held at the capitol in the city of Albany. *Four* argument terms in a year.

The court opens at 10 o'clock A M. on the *first* Tuesday of *January*, *fourth* Tuesday of *March*, *third* Tuesday of *June*, and the *last* Tuesday of *September*.

A term for consultation and decisions, to finish up the year's business, is held in the latter part of December in each year.

The *Chief Judge* has control of the calendar. All propositions in reference to the arrangement or disposition of causes should be addressed to him. (The other members of the Court are usually consulted.)

Causes struck off under the rule are *not included* in the *ten* called each day under the rule.

The Clerk publishes in the newspapers, at Albany, all the proceedings of the Court each day, during the term.

A cause, when ready on both sides, may be submitted upon printed arguments and points, *on any day during the term.*

When causes are decided at the close of each term, the *opinions* are delivered to the *reporter* — not to the *clerk*. In cases of *motions*, the opinions are usually left with the clerk among the motion papers.

Tuesdays and *Fridays* of each week are motion days.

The Court usually adjourn for the term on *Friday* of the fourth week.

Causes argued or submitted are usually *decided at the close of the next succeeding term.*

OYER AND TERMINER.

THE PEOPLE agt. AICHINSON.

The public prosecutor on the trial of an indictment is not entitled to any peremptory challenge of jurors.

What is meant by statutes being *in pari materia*.

(*Waterford and Whitehall Turnpike vs. The People*, 9 *Barb. R.* 161, *dissented from*.)

Queens County Oyer and Terminer. Before S. B. STRONG, *Justice of the Supreme Court*, FOSDICK, *County Judge, and* MITCHELL *and* HENDRICKSON *Associate Justices. November* 1852.

The prisoner was arraigned and tried for the murder of Rocloff Voorhies. The district attorney peremptorily challenged one of the jurors, before the panel had been exhausted. The counsel for the prisoner objected to the challenge, on the ground that the public prosecutor had no right to make it.

J. G. LAMBERSON, *Dist. Att'y, for the People.*

S. L. GRIFFIN and A. HADDEN, *for the Prisoner.*

By the Court, S. B. STRONG, Justice.—At common law any number of jurors might have been challenged peremptorily in behalf of the crown, without alleging any other reason for the objection than *quod non boni sunt pro rege*. The power, however, having been much abused, was taken away by the act of 33d Edward I, commonly called *ordinatio inquisitionibus*. That act provided that "if they that sue for the king will challenge any of the jurors as not indifferent for the king, in order that the inquest shall not remain untaken for that cause, they shall assign of their challenge a *cause certain*, and the truth of the challenge shall be inquired of." The English judges in the construction of this act decided that, as its principal design was to prevent the injuries resulting from a failure to procure the requisite number of jurors from those duly summoned, the right of the crown to challenge for the general cause was not entirely taken away; but that such challenge might be interposed when the juror was first called, and should remain in suspense until a suf-

ficient number was obtained from the panel (1 *Vent.* 309; *Sir T. Raym.* 473; *Skin.* 82; 2d *St. Tr.* 744; 2d *Hale*, 271; *Hawk, ch.* 43, § 3), but if that was exhausted without obtaining a full jury, the public prosecutor was then bound to assign a cause certain for the challenge primarily made by him, and unless that was proved, the challenged juror was to be sworn (3 *St. Tr.* 52; 4 *St. Tr.* 177, 407; *Sir T. Raym.* 473; *Bac. Abr. Juries E.* 10). The terms of the act would seem to require that the cause should be assigned, and inquiry made as to its truth, when the challenge was first made; and if they had been thus applied, the right of the officers of the crown to challenge peremptorily would have been entirely abolished; but the judges of that day were no doubt inclined to favor the king, and therefore declined making any greater change than the reason assigned for passing the act required. The common law rule, as modified by the statute and the decisions under it was adopted in this state, and must prevail here, except so far as it may have been affected by our own legislation.

By the 22d section of the act of the 19th April 1786, it was provided that in all cases where the attorney general of this state in behalf of the state, or he who shall in any case prosecute for the people of this state, shall challenge any juror as not indifferent, or for any other cause, he who shall make any such challenge shall *immediately* assign, and show the cause of such challenge, and the truth thereof shall be inquired of and tried in the same manner as the challenges of other parties are, or ought to be, inquired of and tried (1 *Greenleaf's Laws*, 261). This provision was adopted in the Revised Laws of 1801 and of 1813, with a proviso in each, that nothing in the act contained should be construed to take away the right of peremptory challenge in any case where the same was then allowed by law. The act of April 19th, 1786, was undoubtedly designed to make some changes in the law as it was then understood. The rule in reference to this subject then, was, that the public prosecutor need not assign the cause of his challenge or show the truth thereof until the panel had been ineffectually exhausted, and as a consequence of that, he had a qualified right (if I may use an expression which seems almost to involve a contradiction) to

challenge peremptorily. By the act which I have last quoted, he seems bound to assign the cause and to prove the truth thereof *immediately*. He could not wait until the panel had been wholly called over, but the juror was to be admitted or rejected before the name of another was drawn from the box. The rule of procedure which had alone saved the power under the act of Edward I, having been abolished, the right fell with it.

The proviso in the Revised Laws of 1801 and 1813 was adopted probably to prevent an inference (which certainly would have been far fetched) that the latter clause of the section which it purported to qualify, might imply that a challenge was to be tried and proved in all cases, and thus abolish the right of *defendants* in capital cases to make peremptory challenges. I am confident that the construction which I have put upon the act of 1786 was adopted and prevailed while that act remained unchanged; and that during its continuance no peremptory challenge was allowed to public prosecutors. The right to make one was claimed in the case of Joseph Pharaoh, who was tried for murder at a Court of Oyer and Terminer, held in the county of Suffolk, before Chief Justice Spencer in 1821. It was disallowed by that learned judge without hesitation, on the ground that the settled practical construction of the statute was against the claim. He had great experience in criminal cases, both as attorney general and on the bench, and his opinion was entitled to, as it had, great weight.

The district attorney does not, however, claim the right to make such challenge in this case under the common law or the statute to which I have referred, but insists that he has it under the provisions contained in the Revised Statutes (2 *R. S.* 734, § 11), and the act of April 27, 1847 (*Statutes of* 1847, *p.* 130). The clause in the Revised Statutes is in these words: "The attorney general or district attorney, prosecuting for the people of this state, shall be entitled to the same challenges in behalf of this state, either to the array or to individual jurors, as are allowed to parties in *civil* causes, and the same proceedings shall be had thereon as in civil actions." This was no doubt designed as a substitute for the provision which I have quoted from the act of 1786, and the Revised Laws of 1801 and 1813; and it neither

purported to nor did it make any substantial change It of course related only to challenges for special cause, as such only were allowed in civil actions. It gave no additional powers to the public prosecutor as he had previously the right to challenge the array or the polls for cause shown, in the same way as the defendant (*Co. Litt.* 156; 2 *Inst.* 431; 2 *Hale*, 271; *Bac. Abr. Juries E.* 10; 1 *Chit. Crim. Law*, 534). The object was, no doubt to continue a preëxisting limitation. Clearly it did not give, nor was it designed to give to the attorney general or district attorney a right to interpose a peremptory challenge under any circumstances. The reference was in terms to the existing rule in civil cases. There is no direction that the practice in the two classes of cases which it assimilates, shall continue the same under all circumstances, or that a change in civil actions shall create a correspondent change in criminal cases. The word "are," used in a statute is undoubtedly sometimes ambulatory, so as to embrace what may be the existing relation of any particular subject at a future period. But it has never, so far as I know, been extended so as to comprehend additions distinct from the original subject of the enactment. That would be stretching a provision beyond what the legislature could be reasonably supposed to have contemplated.

The first section of the act of April 27th, 1847, is as follows: "Upon the trial of any issue or issues of fact joined in a civil action, each party shall be entitled peremptorily to challenge two of the persons drawn as jurors for such trials (*Laws of* 1847, *ch.* 134, *p.* 130). Literally this provision is limited to practice in civil actions. There is nothing in the act to evince any design to extend the right which it confers to public prosecutors in criminal cases, and it is not reasonable to suppose that the legislature, had it intended to make so important a change, would have left it to be effected by mere, and to say the least of it, very remote inference.

As the right now claimed was not conferred directly by the act of 1847, it must, if it exists at all, result from the enactments in that and the preceding statute which I have quoted, taken together. The provision in the Revised Statutes referred to the practice in civil actions for the purpose of definition and by no

means evinces a design to create a union which might be progressive. Possession of the same qualities does not constitute identity, nor will a delegation of the same powers create a union in the donees. Where there is identity, an addition to an integral part, and where there is union an addition to one of the subjects composing it is an addition to the whole. But a change in one subject is not a change in another, so long as they preserve their individuality. Upon these principles a statute includes all embraced in the subject matter directly described and all inseparably united to it. Where identity or union has been created by a statute, and a subsequent one relates to the same subject matter or constituent part of it, the two are *in pari materia* and should be construed (except where there is a palpable contradiction) as if they had originally constituted one enactment. Statutes, as was remarked by Chief Justice Hosmer, in the case of The United Society vs. The Eagle Bank (7 *Conn. Rep.* 469), are *in pari materia*, which relate to the same person or thing, or the same class of persons or things. The word *par* must not be confounded with *simile*. It is used in opposition to it, as in the expression, *magis pares sunt quam similes*, intimating not likeness merely, but identity." Possibly the learned chief justice was a little inaccurate in saying that the word *par* denoted identity, but the legal maxim uses it in that sense, and it must be applied accordingly. Now are the subjects of the two enactments which I am considering identical. We have seen that it has not been declared in terms that they are so, nor does the act of 1830 create an identity but a *present similarity* only. An existing likeness is created in the challenges in the two classes of cases, but it is not declared that one shall continue or the extension of either. There is no necessary connection or dependence. Neither is there any general resemblance in the classes of cases to which the challenges respectively belong from which an intention to continue the similitude might be implied. Civil and criminal cases differ widely from each other, in their institution, termination and intermediate proceedings, and to some extent in the principles which control the verdict of the jury. The two challenges which are respectively provided for in the two enactments differ essentially from each other; that in

the act of 1830 being for *cause*, and that in the act of 1847 being *peremptory*, and of course without the assignment of any cause. Surely statutory provisions, one applicable to civil actions, and the other to criminal cases, and the first applicable to challenges for cause, and the other to challenges without cause, can not be deemed to be *in pari materia*. The result then is that the two provisions can not be taken together and construed as one enactment and that the right conferred upon the public prosecutor in the provision quoted from the Revised Statutes of 1830 was not extended by the act of 1847. I am aware that a contrary decision was made by the Supreme Court sitting in the fourth district (Waterford and Whitehall Turnpike vs. The People, 9 *Barb.* 164), but notwithstanding my high respect for the learned judges who decided that case, in opposition however to the opinion of a venerable and distinguished jurist who sat with them, I am bound in a case of so much importance as the one now before me, to abide by my own settled conviction.

The challenge is disallowed.

SUPREME COURT.

Haner agt. Bliss and Bliss.

In an action referable only by consent, a stipulation was signed by the attorneys of both parties referring the cause to Mr. M., and an order was made, on defendants' motion, and on filing the stipulation referring it to Mr. I., *Held*, that the plaintiff had a right to disregard the order entirely and proceed to trial or inquest, as if no consent to any reference had been given.

Steuben Special Term, 1852. *Motion to set aside inquest by default, on the ground that cause had been previously referred.* The cause was not referable except by consent in writing. The attorneys for the respective parties stipulated in writing to refer it to John W. Maynard, and the stipulation was delivered to the defendants' attorney to present to the court at the circuit, and obtain the order. The defendants' attorney presented the stip-

ulation, and by mistake named Mr. Irvine, the law partner of Maynard, and the reference was ordered to him, and the rule so entered in the absence of the plaintiff's attorney. The defendants' attorney subsequently served a copy of the order of reference on the attorney for the plaintiff, who refused to consent to the reference as ordered, and at the subsequent circuit, upon due notice, put his cause upon the calendar and took an inquest by default.

GEO. T. SPENCER, *for Motion*

J. HERRON, *Opposed.*

JOHNSON, Justice.—The cause was regularly in court for the purposes of a trial upon the issue made between the parties, and the plaintiff had the right to have it tried there by a jury. It could not be taken out of court and tried elsewhere without his consent.

The Code (§ 270) provides that "all or any of the issues in the action, whether of fact or of law, or both, may be referred upon the written consent of the parties. In all cases of reference the parties may agree upon a suitable person or persons, not exceeding three, and the reference shall be ordered accordingly" (§ 273). Did this order, thus entered, take the cause out of court for the purpose of a trial? I think not. The plaintiff's consent was upon the sole condition that the cause should be referred to a particular person. But his consent was not acted upon. The defendants undertook to move the court upon it, but through inadvertence failed to do so, and the order was entered referring the cause to another person, without the authority or consent of the plaintiff. I am clearly of opinion that the plaintiff's standing in court was not in the least affected by this order. The statute was not followed and the order was a nullity. It was as much unauthorized as though no consent whatever had been given. The defendants' counsel contends that the order of reference to Irvine instead of Maynard was merely irregular, and operated as a valid reference to the latter until set aside. But this, I think, is a mistake. Suppose in a case like this, there was no pretence of any consent and no application for a reference. Could the judge of his own motion make an order of re-

ference which would be of any force or validity? Clearly not. It is the statute alone which gives the court the power to change the mode of trial; and that power is given upon consent only, manifested by a writing. The consent in this case conferred no power or authority unless it was followed, and clearly it was not. The court had no jurisdiction to make the order which was made, and it was void (Garcia vs. Shelden, 3 *Barb. S. C. R.* 232).

It is not the irregular exercise of power, of which the court are clearly possessed, but the entire absence of all power to make the order in question, which constitutes the difficulty. And this is the essential line of distinction between void and voidable acts. The action was, therefore, still in court to be tried, and the inquest regular. Motion denied.

SUPREME COURT.

The People agt. Hayes and others.

An action against a public officer, sued for an act done by him by virtue of his office, must be tried in the county where the cause of action arose, unless changed for causes specified in the statute. And this is so, although the suit is brought by the people and prosecuted by the attorney general of the state.

In personal actions, sued by the attorney general, the king could sue in any county he pleased; and the people of this state have succeeded to the rights of the crown. But this rule has been here modified by statute. Regard, however should still be had to the opinions of the attorney general and other public officers, acting for the state, as to what will be for the public interest.

Commissioners appointed by the act of the legislature, to lay out and build a road for the use of the public, are public officers.

An office is a public charge or employment; and every office is considered public, the duties of which concern the public.

Very little reliance can be placed upon an allegation of the materiality of witnesses, unless it be shown wherein they are material. But the place of trial may be changed upon such an affidavit, when no witnesses are shown to reside in the county where the venue is laid.

Schenectady Special Term, November 1852. This was a motion by the defendants to change the place of trial from the

county of Albany to the county of Clinton. The affidavit of one of the defendants, stated that deponent resided in Clinton county; that the attorney general had brought a suit against the defendants, wherein the complaint charged that they were commissioners under the act entitled " an act to provide for laying out and opening a road from Clinton county to Carthage in Jefferson county, passed April 16, 1852 (*Laws of* 1852, *p.* 519), and as such had laid out a road on a route wholly unsuitable, and not within the meaning and intention of the act; and also charging that the defendants were guilty of fraud; and with corrupt purposes had laid out the road on a wrong route. That they had drawn about $17,000 from the state treasury, and were proceeding to open the road so improperly laid out, and the plaintiffs prayed an injunction, &c., and that the money be returned. That the defendants had put in their answer, denying all improper conduct, and alleging that they had, as commissioners under and by virtue of the act, laid out the road strictly in conformity thereto, and on the most direct and convenient route. The affidavit further stated that certain witnesses, whose names were given, and more than twenty-five of whom reside in Clinton county, and six in Franklin county, were material, &c., but did not state what the defendants expected to prove, or what part of their case they expected to sustain by said witnesses.

L. Stetson, *for the Motion.*

G. Stow, *Contra.*

Hand, Justice.—The motion is pressed upon two grounds: convenience of witnesses, and that the defendants are public officers (*Code*, § 124, 125, 126).

Very little reliance can be placed upon an allegation of the materiality of witnesses, unless it be shown wherein they are material (see *Rule* 44; Jordon vs. Garrison, 6 *How. Pr. R.* 6). However, as there is no affidavit of any witnesses on the part of the plaintiffs, if the motion turns upon this point, it must be granted.

Are these commissioners public officers? Mr. Justice Nelson was inclined to consider certain persons, like these defendants, appointed by an act of the legislature to perform certain public

duties, officers; particularly as they were so denominated in the act appointing them (The People vs. Comptroller, &c. 20 *Wend.* 595). In the 9th section of this act, the comptroller is authorized to fill any vacancies that might occur "in the office of said commissioners." The statute requires an action against a "public officer," for an act done by him by virtue of his office, to be tried where the cause of action arose, unless changed for causes specified in the act (*Code*, § 124). "An office," said Chancellor SANDFORD, "is a public charge or employment, and the term seems to comprehend every charge or employment, in which the public are interested (Wood's case, 2 *Cow.* 30, *n.*). Every office is considered public, the duties of which concern the public (5 *Bac. Ab.* 180; 2 *Tom. Dic.* "Office"; People vs. Bedell, 2 *Hill*, 199). BEST, Ch. J., in Henley vs. Mayor of Lyme (5 *Bing.* 91), said, "in my opinion every one who is appointed to discharge a public duty, and receives compensation, in whatever shape, whether from the crown or otherwise, is a public officer." I think the official character of the defendants gives them the privileges of public officers as to the place of trial (*Code*, § 124, *subd.* 2). From the affidavit, it seems, the misfeasance or malfeasance in laying out the road, is charged to have been, in part at least, committed in the county of Clinton. The money was drawn at Albany. But the complaint, as to that, is not that it was received, but misapplied.

Are these rules applicable, in a suit by the people? I came to the conclusion, in a recent case, that in many respects, the people, upon obtaining our independence, succeeded to the rights of the crown (People vs. Van Rensselaer, 8 *Barb.* 189). And I find nothing in The People vs. Arnold (4 *Comst.* 508), overruling this doctrine. (And see People vs. Thurman, 3 *Cow.* 16; People vs. Herkimer, 4 *id.* 345.) And it seems pretty clear that in personal actions, the king could lay his action in any county he pleased (16 *Vin.* 538; *Com. Dig. Prerog. D.* 85; Attorney General vs. Churchill, 8 *Th. & W.* 171, and cases there cited. And see Rex vs. Hunt, 3 *B. & Ald.* 444). But this rule may be abrogated by positive statute; and this, I think, has been done in some suits against public officers, of which this is one. Where the statute has not taken away all discretion, no doubt

regard should be had to the opinions of the attorney general and other public officers acting for the people, as to what would be for the public interest. But nothing appears in this case requiring the court to retain the place of trial contrary to the general rule. Motion granted.

SUPREME COURT.

SHUART agt. TAYLOR.

Where a cause was referred and tried before the referee, who made a report therein which was set aside by this court, and a new trial ordered, with costs to abide the event, without further directions, and the same referee tried the cause again, after objections thereto on the part of the defendant, *it was held* that he had power to do so, and that the objection was properly overruled.

A report of a referee will not be set aside as contrary to the evidence, unless there is a decided preponderance of evidence against it.

If a person who has, by agreement with the owner of land, an interest in a fallow, for the purpose of raising a crop of wheat—each to have one half—executes a chattel mortgage upon the fallow, the mortgage will bind the interest of the mortgagor in the fallow, and in the wheat afterwards put in under the agreement.

Where the owner of a chattel mortgage brought an action of trover, before the Code, for a sale of the mortgaged property, made without his assent, before the mortgage money had become due, and when he had not taken possession, *Held*, that the action would lie.

A mortgagee of a chattel has the entire legal title thereto, subject only to be defeated by a performance of the condition of the mortgage, and is entitled to the possession immediately, when there is no provision in the instrument that the possession may be retained by the mortgagor.

Monroe Circuit and Special Term, January 1852. This was an action of trover, brought in 1847, to recover the value of a quantity of wheat. The plea was the general issue. The cause was referred by consent to H. Humphrey Esq., sole referee, before whom it was tried, and who in March 1848, reported in favor of the defendant. A motion was made on the part of the plaintiff, to this court, to set aside the report, the decision of

which, as entered in the minutes of the clerk, was in these words: "New trial granted, costs to abide the event." The plaintiff noticed the cause for a second trial, before the same referee, in August 1851, and the parties by their counsel appeared before him, in pursuance of the notice, when the counsel for the defendant objected that the referee had not authority to try the cause again. The referee overruled the objection, and the parties proceeded to the second trial. It was proved, on the part of the plaintiff, that one Ezra T. Cogswell, on the 5th of September 1844, executed a promissory note for $75, payable to George W. Clark, or bearer, by the 1st day of October 1845, with interest; and that on the 17th of September 1844, Cogswell executed a chattel mortgage to Clark, as collateral security for the payment of the note, of all the right, title and interest of the mortgagor "in and to about thirty acres of fallow or wheat, on the farm of D. Tracy, better known as the Ezra Taylor farm, of the town of Pittsford," which mortgage contained a clause authorizing the mortgagee, in case of default in payment, at the time limited therefor, to take the property and sell the same, and out of the money to arise from the sale to pay and retain the amount of the debt and charges, he rendering the overplus to the mortgagor. The mortgage was filed in the town clerk's office in Pittsford, the same day. On the 18th of September 1844, Clark assigned the note and mortgage to the plaintiff. The other facts proved, so far as is necessary to an understanding of the points decided, are stated in the opinion of the court. The referee reported in favor of the plaintiff, for $112·26, October 22, 1851, and the defendant, upon a case made, moves to set the report aside.

S. B. Jewett, *for Plaintiff.*

J. Abrams and H. R. Jerome, *for Defendant.*

T. R. Strong, Justice.—The effect of the decision of the court, and the rule entered thereupon, setting aside the former report of the referee, and directing a new trial, was to place the cause in the same situation, in respect to a trial, it was in before it was first tried. The order of reference was not set aside, but remained in full force; and the duties and powers of the referee were precisely the same as if he had not previously reported,

The objection made on the part of the defendant, to his retrying the cause, was therefore properly overruled.

In respect to all questions of fact in the cause, upon which the referee has passed, I must hold his report conclusive. There was some evidence tending to the conclusions to which he arrived, and no such decided preponderance of evidence against them, as to warrant this court in disturbing them (Durkee vs. Mott, 8 *Barb.* 423, 425, and cases referred to in note).

The chattel mortgage, under which, and an assignment thereof to him, the plaintiff claimed title, was upon the interest of Cogswell in the "fallow or wheat." What was that interest when the mortgage was given? According to the finding of the referee, the defendant on selling his farm had reserved to Cogswell, by parol, the right to sow the thirty acres, on which the wheat was raised, with wheat on shares, his share to be one half, and the purchaser of the farm to have the other half; he did sow the wheat, and when the crop was ripe, harvested it. Cogswell, as appears by the proof, at the time of the sale of the farm, was living on and had crops upon it; he had partly prepared the ground for the crop, and continued to live there until the spring after the wheat was put in. Upon this finding and proof, it is clear that Cogswell, at the time of giving the mortgage, had a right to the use of the thirty acres for the purpose of raising a crop of wheat, and having one half (Austin vs. Sawyer, 9 *Cow.* 39; Mott vs. Palmer, 1 *Comst.* 564). The owner of the farm, having permitted him to prepare the ground and sow the crop, was concluded from denying his right. Having such an interest, I see no good reason why the mortgage did not, upon its execution, become a lien upon it. The referee has found that part of the wheat was then sown; but however that fact may be, as the mortgage was upon the interest of Cogswell in the "*fallow*," I am of opinion it bound his right to the use of the land, and the wheat which was raised in the exercise of that right. This is not the case of a mortgage of property which the mortgagor did not own at the time, but one of a mortgage upon an interest in property which then belonged to the mortgagor (Otis vs. Sill, 8 *Barb.* 111, 112, and cases cited; Barnard vs. Eaton, 2 *Cushing*, 303; Codman vs. Freeman, 3 *id.* 306).

Regarding the mortgage as operative upon one half of the wheat, can the plaintiff maintain trover, for a sale of the crop after he became assignee of the mortgage, made without his assent, before the mortgage money became due, and when he had not taken possession? The conclusion to which I have arrived upon this question is, that the legal operation of the mortgage was to vest in the mortgagee the entire legal title to the property mortgaged, subject only to be defeated by a performance of the condition of the mortgage; that there being no provision in the instrument for the retaining of the possession of the property by the mortgagor for any time, the mortgagee had a right, by the instrument, to the immediate possession thereof, which right was acquired by the plaintiff by the assignment to him; and this right of present possession was sufficient to entitle him to sue in trover, for a conversion; and that such sale was a conversion (Mattison vs. Baucus, 1 *Comstock*, 295; Butler vs. Miller, *id.* 497; Lyon vs. Coburn, 1 *Cushing*, 278; Coles vs. Clark, 3 *id.* 399). In the case last cited, Chief Justice Shaw, in delivering the opinion of the court says: "We must take it as settled that a mortgage of a chattel, vests a property in the mortgagee; not an absolute title indeed, but a present title, defeasible upon a condition subsequent." And again: "Another consequence of this relation is, that as a general rule, the right of possession follows the right of property; and therefore, when there is no restraining stipulation, the mortgagee having the right of property, until defeated by the performance of the condition, has as an incident thereto the right of possession, and may therefore take the goods into his own custody, or maintain trespass or trover for them, against any one who takes or converts them to his own use." That case is also in point on the question of conversion.

The position taken by the counsel for the defendant, that the defendant was a tenant in common of the crop with the purchaser of the farm, and had a right to do what he did, is disproved by the report. The plaintiff, who under his mortgage had the legal title to Cogswell's share, was a tenant in common with the owner of the land, if such a tenancy existed in respect to the crop; and, in that view, the sale of the wheat by the lat-

ter, without the assent of the plaintiff, and with the assent of the defendant, who claimed title to the one half covered by the mortgage, and the receipt by the defendant of the avails of that half, was, as to the plaintiff, a conversion by the defendant.

Entertaining these views, I must deny the motion to set aside the report.

SUPREME COURT.

GERE agt. SUPERVISORS OF CAYUGA COUNTY.

A public officer who is liable to be sued for services rendered for the public at his request, may confess a judgment in his official capacity, for the amount.

The supervisors of the county are, however, not concluded by the judgment; they have a right to go behind it and inquire whether the whole or any part of the cause of action was a county charge.

The overseer of the poor can not incur for the county a liability beyond the sum of ten dollars, for relief in a single case, without the consent of one of the superintendents of the poor.

But with this restriction, his power of giving temporary relief is independent of the control of the superintendents of the poor.

Cayuga Circuit and Special Term, November 1851. This was an application on the part of Joel Gere, for a mandamus to compel the board of supervisors of Cayuga county to audit and allow a judgment for $14·96 damages and 47 cents costs in his favor, against Gilbert Westfall, overseer of the poor of the town of Niles in said county, and to add the amount of said judgment, with the interest, to the amount of tax to be laid upon the county according to statute. The affidavit on which the application is founded, shows that the demand was for services rendered as physician and surgeon, and medicine "for the said Gilbert Westfall, overseer of the poor of Niles, and at the request of said Westfall, as such overseer." And also, that the said board, by a vote of the majority of its members, refused to allow said judgment or pay the same, or include it in the charges to be levied upon the county. The judgment was by confession before a justice of the peace.

In answer to the order for that purpose, the board of supervisors appeared and showed for cause, that the services for which the judgment was confessed, were rendered for one Ursula Barber, a pauper, residing in the north district of the town of Niles, at the request of the overseer of said town, without the approbation or consent of the superintendents of the poor of the said county, or either of them. That the superintendents of the poor of the county had made an arrangement by contract with doctors Baker and Devoe, for all medical services and attendance which should be required by any pauper in said district, at a stipulated price; that said arrangement was known to said overseer and Gere; and that said overseer was directed by one of the superintendents to employ said Baker and Devoe before employing said Gere. And they insisted that no mandamus should issue for the following reasons:

1. Because the said overseer of the poor of the town of Niles had no lawful authority to confess the judgment in question, and that it is absolutely void.

2. Because the overseer had no lawful authority to incur a liability beyond ten dollars for relief to a pauper without first having obtained the consent in writing of one of the superintendents.

3. Because the authority of the superintendents of the poor of Cayuga county is superior and paramount to that of the overseer of the poor of the town of Niles, and that when the autority of the former had been exercised in making a specific provision for medical care of the poor of a certain district for a certain time, and the overseer of the town was notified of the fact, he, said overseer, could not lawfully employ another physician, and thus subject the county to the payment of double charges for medical care of the poor of said district.

4. Because an overseeer can not do any act in the administration of temporary relief to the poor, by which he can lawfully subject the county to pay more than ten dollars in one case, except with the consent of one of the superintendents, and any judgment for an amount exceeding that sum must be either void in whole or for the excess.

GEO. RATHBONE, *for Motion*

B. F. HALL, *Opposed.*

JOHNSON, Justice—I see no reason why a public officer, who is liable to be sued for services rendered for the public at his request, may not confess a judgment for the amount as well as any other person. The justice is authorized by statute (2 *R. S.* 245, § 113) to enter a judgment by confession of the defendant, *in any case* where the debt or damages confessed shall not exceed $250. Certain requisites prescribed by § 114 must be complied with or the judgment is void as against all persons, except the defendant making the confession, and bona fide purchasers under the judgment.

The statute is broad enough to include public officers, and I am of opinion that in every case where a person is liable to be prosecuted to judgment, he may lawfully confess a judgment for the amount justly due. I can conceive no sound reasons of public policy, which require the public to be burthened with the costs of litigation in every case where a claimant proceeds to put his demand into judgment. There is no pretence that all the requirements of the statute were not complied with.

But the judgment is for a sum exceeding ten dollars damages. The moving affidavit does not show to what person, or on what particular occasion, the services were rendered. The answer of the board shows that the services were rendered to a single pauper, and without the sanction in writing, or otherwise, of one of the superintendents of the poor of the county. This being the case, the whole of the judgment was not a county charge. It is conceded that the paupers in this county are to be supported at the expense of the county. In such cases the overseer of the poor of any town can not bind the county by the expenditure of any greater sum than ten dollars in a single case, without the sanction, in writing, of one of the superintendents; and to that extent, only in cases where the person applying requires only temporary relief, or is unable by sickness or infirmity to be removed to the county poor house (1 *R. S.* 624, 625, § 42). If the overseer transcends his authority, he does it at his peril, and at his own personal charge and expense. He can not impose bur-

thens upon the public any farther than the statute gives him power to do so. And all persons employed by him are bound to know the law and take notice of the extent of this statutory power. The board of supervisors were not bound to include the judgment in the tax to be laid upon the county, although it was against an overseer of the poor, and for services rendered to a pauper at his request, unless the judgment was rendered "on account of the liability of such county" (2 *R. S.* 474, 475, § 102, 103).

It was manifestly the duty of the board of supervisors to inquire and ascertain whether the county was liable for the services before allowing the judgment, and including the amount in the tax to be levied. They were by no means concluded by the judgment, but had the right to go behind it, and inquire into the character of the services upon which it was founded.

As the county, under no circumstances, could be made liable for any greater sum than ten dollars in such a case, the mandamus to compel the allowance of the whole judgment must be denied.

But I am of opinion that the overseer in the administration of temporary relief, within the limit of his powers, was not bound to employ the physicians with whom the superintendents had entered into contract. To the extent of his authority it is a discretionary power, to be exercised according to his own judgment. This power of giving temporary relief to this limited extent, is vested in the overseer of the poor in the town by statute, and the superintendents have no right to overrule or control him in the exercise of such powers. Nor is he in any way answerable to them for an indiscreet or injudicious exercise of his discretion. It might have been much more economical and quite as serviceable to the pauper to whom the relief was afforded, had the overseer employed the physicians who were under contract to administer to all paupers within the district. But I do not think he was bound to employ them. If he had a duty to perform, it was his right to exercise his own judgment in the premises, and employ such physician as he deemed most competent to prescribe for the case (Exparte Green and Brown, 4 *Hill*, 558).

It is not pretended that it was not a proper case for temporary relief to be ordered by the overseer. And, as the case stands,

had the judgment been for ten dollars, it being for relief in a single case only, or had the applicant only asked the board of supervisors for the allowance of ten dollars upon the judgment, it should, in my judgment, have been allowed and included in the amount of the county tax. But as they were required to allow the whole judgment, their refusal was proper. That being the ground of the application here, the mandamus is denied.

SUPREME COURT.

Leaycroft agt. Fowler.

The consent to refer, required by § 270 of the Code, may be written by the parties or their attorneys, or by the clerk entering their consent in the minutes of the court, or by the referees in their minutes, such consent being made before them.

The parties also may waive by their acts any further writing than the entry on the minutes of the referee, if more were otherwise necessary.

New York Special Term, October 1852. The parties by consent duly entered, referred this action to two referees; the referees found in an early stage of the proceeding that they probably would not agree, and proposed to the parties the addition of a third referee. To this the attorneys assented, and Mr. Hoffman was mutually agreed on; being suggested by Mr. Poisson, whom the defendant's attorney had at first proposed, and then proposed by the defendant's attorney himself. At the same time the referees entered in their minutes, " at this stage of the proceedings Mr. Edward Hoffman was added as a third referee by consent." After this Mr. Hoffman continued to act without any objection to him; he joined with another referee in a report against the defendant; the defendant obtained time to make a case to set aside that report on the merits, and made a case accordingly. After the case had been more than once noticed for hearing on the merits, the defendant first started the objection that Mr. Hoffman was not regularly appointed, because the parties had not signed the consent.

MITCHELL, Justice.—It is enough under the Code (§ 270), if the appointment of referees be made on the written consent of the parties; this may be written by them or by their attorney, or the clerk of the court entering their consent in the minutes of the court, or the referees, who stand in the place of the court, entering it on their minutes. This last was done here and was sufficient. The parties also might by their acts waive any further writing than such as existed on the minutes of the referee, if more were otherwise necessary, as they may waive a trial by twelve jurors by allowing eleven, or any less number, to act without objection. The subject is so well treated in Keator agt. Ulster and Delaware Plank Road Co. (7 *How. Pr. R.* 41), that a reference only to that case is necessary.

Good faith required that the defendant should never have raised the objection, and that he should have immediately supplied any defect in form in the appointment, if there was any. It is proper, therefore, that he should pay the costs of both motions.

The motion to set aside report of referees is denied with $10 costs; and the motion that the name of Mr. Hoffman be entered as one of the referees, as of the day when the consent was first given, is also granted with $10 costs to the plaintiff.

SUPREME COURT.

GRAHAM agt. GOLDING AND OTHERS.

Where the necessity of examining a long account, depends upon the decision of another issue in the action, as whether a partnership existed, a reference will not be ordered until that issue has been first tried.

New York Special Term, September 1852. The action was against a judgment debtor, and against other persons who were said to be, in fact, his partners, but pretending to be his employers, and the plaintiff claims an account of the debtor's share in the supposed partnership. The partnership was denied by the defendants. The plaintiff asked for a reference on the ground that the examination of a long account would be necessary.

MITCHELL, Justice.—It is admitted that no account will be necessary if the plaintiff fails to prove a partnership. The issue substantially is, whether there is a partnership or not; and then if the plaintiff succeeds, the accounting would follow to ascertain the *amount* which he is entititled to recover. Thus the accounting is like an inquiry to assess damages, and until it is known that there is a partnership, it can not be said in this case that the trial of the issue of fact will require the examination of a long account. In one case, that has occurred in this court, the previous dealings of the parties and their contract was such, that the question whether there was a partnership or not could only be ascertained by first going into the accounts—the plaintiff being entitled to be a partner on his bringing into the business a certain amount of capital, and he insisting that he had done so, and that the books would show it—there the reference was ordered. But here the question of partnership or not, does not turn on any such peculiar circumstances. The general rule, therefore must prevail, that the question of partnership be first settled by an issue, or by the court, before a reference can be ordered by the court. Motion for reference denied, without costs.

SUPREME COURT.

TROTTER agt. LATSON.

A party to the action can not be compelled by service of a *subpœna duces tecum*, issued *ex-parte*, without any order of the court or a judge, to produce his books and papers on the trial.

New York Special Term, November 1852. This was, in effect, a motion to commit the defendant for not bringing his books and papers before a referee, in compliance with a common *subpœna duces tecum*, issued without any order of a judge, previously obtained for the purpose.

ROOSEVELT, Justice.—As the law now stands, a *party* may be compelled to *testify* as a witness, "in the same manner and sub-

ject to the same rules of examination as any other witness." (*Code*, § 390).

Does this language necessarily import an obligation not merely to answer orally, but to bring with him and exhibit his books and papers?

A liberal construction, such a construction as is generally applicable to the provisions of the Code, might, and under ordinary circumstances probably would, justify such a conclusion, if necessary to prevent a failure of justice.

Here, however, no such failure would result. Section 388 provides that the court, or a justice thereof, may, *in their discretion*, and upon *due notice*, order either party to give to the other an inspection and copy, or permission to take a copy of any books, papers and documents in his possession, or under his control, containing evidence relating to the merits of the action or the defence.

The special case, therefore, is specially provided for. It is not left to doubtful inference from general expressions. And from the guarded language of the section it is obvious that the books and papers of a party, however private and confidential, were not to be invaded by strangers as a *matter of course*. Due notice is first to be given to him. The facts and circumstances, on which the claim to the discovery is founded, must be stated in writing, and verified by affidavit (*Rule* 9). And the necessity of the discovery must also be certified by counsel and sworn to by his client. Counter statements may be made, and both parties must be heard, or have an opportunity of being heard by the judge, on the whole matter. And even then, the order is not a matter of course. The judge has a *discretion*, and in proper cases should exercise it, to deny the application.

This power, it should also be observed, is not given to any clerk or ministerial officer, or even to a referee, but to "the court or a judge or justice thereof."

My conclusion is, that the defendant was not bound, on a subpœna, issued ex parte and without a previous order to produce his books before the referee, and that he has, therefore, committed no contempt of court in refusing to do so.

Motion for attachment denied without costs.

SUPREME COURT.

Perry agt. Griffin.

Nothing can be allowed on the taxation of costs for payments to a commissioner for executing a commission to take testimony in another state, and to witnesses for attending before the commissioner.

They are disbursements of a *party*, for which no provision is made by law.

——— *Special Term, February* 1852. *Taxation of costs.*

The bill of costs on the part of the plaintiff in this action, which was commenced in 1846, contained charges for,

" Paid commissioner for executing commission issued in 1847, ... $13·60

" commissioner for executing commission issued in 1849, ... 16·58

" witnesses for attending before commissioner, ... 5·86

T. R. Strong, Justice.—It appears by an affidavit of the plaintiff presented to me, that the commissions were executed in Michigan, and that these payments have been actually made; and I am satisfied from statements in the affidavit as to the examination of the witnesses, and the number of pages covered by the deposition, that the sums paid were not unreasonable Are these items taxable? It is obviously just they should be allowed if there is any provision which will warrant it. In Kenney vs. Van Horn (2 *Johns.* 147), under the fee bill then existing (2 *K. & R.* 72), it was held that charges for executing a commission would not be allowed; but in Corlies vs. Cummings (7 *Cow.* 154), under the fee bill of 1813 (2 *R. L.* 15), charges for drafting and copying the depositions, were allowed (see also 8 *Cow.* 109). The latter fee bill was regarded broader than the one in existence when the case of Kenney vs. Van Horn was decided. It provided compensation by the folio for entries or *proceedings* in a cause, and the depositions were regarded as a necessary *proceeding*. When this action was commenced, the folio system had been abolished; hence no allowance can be made for the services of the commissioner in the form adopted in Corlies vs. Cummings; and I am not aware of any provision under which charges for

his services are taxable. In Goodenow vs. Livingston (1 *How. Pr. R.* 232), Beardsley, Justice, disallowed charges for attendance of witnesses before the commissioner, on the ground that the commissioner was not a court or officer, within the meaning of the statute. It is fair to infer from this decision, that Justice Beardsley was of opinion that no other ground for their allowance existed. I entirely concur in the view taken by him of the question. If charges for fees of the witnesses and commissioners are not taxable, charges for payment of their fees can not be. They are disbursements of a *party* for which no provision is made. They are not included in the provision making allowance for the necessary disbursements of an *attorney* (2 *R. S.* 633, 634).

The charges in question must, therefore, be rejected,

SUPREME COURT.

The Broadway Bank agt. Danforth.

Where a party means to treat a paper or proceeding irregular, as amounting to a nullity, he should not only give notice of such intention but point out the alleged irregularity.

New York Special Term, 1852. The complaint was verified, but the defendant deeming the verification insufficient, put in his answer without oath. The plaintiff returned the answer without stating what his objection to it was.

Mitchell, Justice.—It is a rule that a party moving to set aside proceedings as irregular, must point out the irregularity, and also on the same principle that a party returning a pleading as irregular, shall also state in what it is irregular. In this way the opposite party is enabled to correct the irregularity, if it admit of correction, and the rights of the suitors are saved without subjecting them to the expense of application to the court. Here the plaintiff, by its cashier, swore to the truth of the complaint; the defendant put in an answer without oath, assuming that the verification of the complaint was a nullity; the plaintiff returned the answer, but without stating what his objection to it

was. If he had made the statement, the defendant would have had the opportunity to correct the answer, and perhaps would have done so. The plaintiff, therefore, was irregular on his part. But the irregularity of the defendant is still more glaring. He not only omits to point out to the plaintiff what is the supposed defect in the plaintiff's complaint, or its verification, but assumes also to adjudge the verification a nullity; and giving that assumption the force of an order of the court, as if the court had pronounced that in law there was no verification, he puts in his answer without any verification. If a party, even when moving the court to set aside a proceeding as irregular, must point out the irregularity, much more should he do so, when, without appealing to the court, he means to treat it as irregular; if he had done so, the plaintiff might have elected to cure the alleged irregularity.

Both parties being irregular, and the defendant being now notified of his irregularity, he should put in his answer under oath within the same time after the order to be entered shall be served upon him that he had when the answer was served, otherwise the plaintiff may proceed as if no answer were put in.

SUPREME COURT.

GELLER agt. HOYT.

Where a judgment was docketed correctly as to the christian and surname of the defendant, but incorrectly as to the initial of the middle name, and the docket was afterwards corrected on motion, *Held*, that the judgment took priority as a lien from the date of the original docketing, as against a subsequent judgment obtained before the correction.

The county in which a motion should be made is not a question of *jurisdiction*.

Where one creditor has the first lien on two distinct securities, and another has a subsequent lien on only one of them, the latter has an equity to insist that the former should resort first to the security on which the latter has no lien.

New York Special Term, September 1852. Azor Hoyt owned certain lands in this city and mortgaged them to the plaintiff. Afterwards, on the 22d April 1850, he conveyed them, subject

to the mortgage, to Samuel I. Smith, who, on 1st June 1851, executed another mortgage for $1,600, on the same premises, to E. N. Cobb, which was duly recorded. One Bloomingdale obtained a judgment against Smith in the Supreme Court, for more than $7,000, which was entered in Albany on 25th October 1851, and of which a transcript was filed and docketed in the office of the clerk of this county on 27th October 1851. Blydenburgh now owns that judgment, and it is unpaid. On 15th March 1852, Tyler obtained judgment in this court against Smith for upwards of $2,000, which was duly docketed on that day; and on 27th March 1852, Tyler took out an order supplementary to an execution for the examination of Smith, and enjoining him from assigning any of his property, which was served on Smith on that day. Before this last judgment was obtained, Cobb's mortgage had been reduced to $1000, and he had received from Smith two promissory notes of $500 each, made by Peck, a debtor of Smith, "as collateral security for the payment of said mortgage, and he gave a receipt stating that the notes, when paid, would be in full of the amount due on the mortgage." Also before March 1852, the plaintiff had commenced a foreclosure of his mortgage, and the mortgaged premises were sold under that foreclosure by order of this court, on 16th April 1852, and yielded a surplus of $1,399·47. On 21st April 1852, Tyler served on Cobb notice of the proceedings against Smith, and claimed a lien on the notes.

On 2d June 1852, the whole purchase money was paid to the sheriff. On the 5th of that month, Peck paid the amount of the two notes to Cobb, who still holds the money and the bond and mortgage. Peck was probably persuaded by Blydenburgh to make the payment.

The judgment in favor of Bloomingdale was made up correctly against Samuel *I.* Smith; but in the judgment *book* in Albany, and in the docket there and in this county it was entered as against Samuel *T.* Smith. On 29th May 1852, the docket here was corrected by order of a judge of this court and of the first district, while at chambers—but by an order as in court (§ 401); and Blydenburgh, with his consent, was on that day made a party defendant to the foreclosure suit.

Blydenburgh and Tyler now oppose each other, each claiming for himself the whole surplus; all objections as to the form in which the questions are brought up, are waived.

—— ——, *for Plaintiff.*

—— ——, *for Defendants.*

MITCHELL, Justice.—It is objected to the judgment held by Blydenburgh, that it was not a lien as against a subsequent judgment creditor, because it was not docketed so as to give the true name of the defendant. The christian and surnames were given correctly, and these, for some purposes, constitute the whole name, and afterwards the error in the letter T, which is not a name, but only an *inttial* of a middle name, was corrected by order of the court, by substituting the *initial* 'I' in place of 'T' in the docket here. The *judgment* was right and needed no correction; and as to lands here, it was immaterial [illegible] docket was in Albany; a transcript is to be made from the judgment (Laws of 1840, *p.* 334. § 26), not from an erroneous docket. The judges in the first district have power to make *orders* at chambers as if they were in court; and although the venue was laid in Albany, any Supreme Court Justice had *jurisdiction* to hear the motion and make the order, although if objection were made, he should not hear the motion; the order when made is the order of the Supreme Court. It is said that the order affected third persons; the answer was given in Chichester vs. Candee (3 *Cow.* 39, 56), that "all amendments may affect, more or less third persons;" but if justice requires that they should be made, that objection will not prevent their being made; still the court would save the right of bona fide purchasers, and incumbrances for a new and valuable consideration: a judgment creditor for an antecedent debt is not in this class. Then what were the rights of Bloomingdale before Tyler got his order for the examination of Smith, and what rights did Tyler acquire by that order? Assuming the most that is contended for, that order gave no greater right to Tyler than if Smith had then executed an assignment to him; that is, it passed to Tyler all Smith's title in any personal property, or rights of action which he had, *subject* to any equities or rights which other persons had in such property.

Before that order, Bloomingdale had, by virtue of his judgment, a lien on Smith's real estate, and on that alone. Cobb had, by virtue of his mortgage, a prior lien on the same real estate to the extent of $1000, but had also a lien on the two notes for the same $1000. Cobb then had two securities for his debt and Bloomingdale had only one of those securities. Bloomingdale had, therefore, an equity to insist that Cobb should pay himself out of the security on which Bloomingdale had no lien, namely, the notes, and leave the other security, the land, to be resorted to by Bloomingdale alone. Smith's title to the notes was subject to this equitable right in favor of Bloomingdale, and when the order was made against Smith enjoining him from assigning his property, he had no right in the notes except subject to this equity in favor of Bloomingdale, and he could pass no right to Tyler except subject to that right. The surplus, therefore, must be considered as passing to Bloomingdale, under the judgment in his favor, or to his assignee.

As the difficulties arose from the omission of Bloomingdale, or those acting for him, and there has been no unfair litigation, the costs of both parties on the reference should be paid out of the fund.

SUPREME COURT.

SHELDON AND PHELPS agt. HAVENS.

In case of a transfer of the interest of the plaintiff in the subject of the action, it is optional with the court, on the death of the plaintiff, whether or not to allow the assignee to be substituted and the action continued in his name; and on the application, the defendant should be heard and his interests taken into account.

New York Special Term, November 1852.

ROOSEVELT, Justice.—Phelps, one of the plaintiffs in this action, after its commencement assigned all his interest to Sheldon, the other plaintiff.

Sheldon then died, and his administrator now asks that the suit may be continued in his name alone, as the sole existing party in interest.

The Code first provides that "no action shall abate by the transfer of any interest therein;" and secondly, that in case of such transfer, "the action shall be continued in the name of the original party; or, the court *may* allow the person to whom the transfer is made, to be substi uted in the action.

It is optional, therefore, with the court to allow or not, the retirement of Phelps. As in that case, however, there would be no party to respond in costs but an administrator; and as the change is strenuously objected to, and no necessity for it is shown, it appears to me proper that the action, so far as he is concerned, should, as it clearly may, be continued in the name of the original party.

As to the administrator of Sheldon, the Code (§ 121) provides that in case of death of a party, the court may, on motion, "allow the action to be continued by his representative."

The administrator, therefore, may be let in; and under the circumstances of this case, it is peculiarly proper that he should be, to prosecute the suit; he being, if the allegations are well founded, the only real party in interest.

An order will be entered that the action be continued in the name of Phelps, and of Sheldon's administrator.

SUPREME COURT.

Ridgeway agt. Bulkley and others.

The representatives of a deceased plaintiff, who dies pending the action, have no right to elect whether it shall stand revived or not; the defendants are entitled to have the suit continued in the name of the plaintiff's representative.

Albany Special Term, Nov. 1852. *Motion by defendants that the action be continued in the name of the administratrix of the plaintiff.* The suit was cemmenced in June 1848, and was an action of assumpsit. Issue was joined, and the cause was referred. A trial was had before the referee, but, before he made his decision, the plaintiff died. On the 6th of May 1851, Julia Ridgeway, the plaintiff's widow, was duly appointed administratrix of his estate.

O. MEADS, *for Plaintiff.*

G. W. BULKLEY, *for Defendants.*

HARRIS, Justice.—The 121st section of the Code is, for the most part, a reënactment of the provisions of the Revised Statutes, in relation to the abatement of suits in equity (2 *R. S.* 184, §§ 107 to 119). If a plaintiff died, the court, upon the application of the defendant might order his representatives to show cause why the suit should not stand revived in their names, or the bill be dismissed. The chancellor held that this provision was intended to authorize the revival of a suit, by a summary proceeding, and that the representatives had no right to elect whether the suit should stand revived, or the bill be dismissed. This, I think, is the true construction of the section of the Code in question. It declares, generally, that in cases where the cause of action survives, the action shall not abate; and then, to give effect to this rule, it authorizes the court to make an order for the continuance of the suit in the name of the representative. This was so held, in case of the death of a defendant, in Waldorph vs. Bartle (4 *How. Pr. R.* 358). It was held, in Vrooman vs. Jones (5 *How. Pr. R.* 369), that the statute could not be made applicable to one who had succeeded the defendant in interest before the adoption of the Code. In that case, a defendant in ejectment had, before the adoption of the Code, sold his interest in the land in controversy to another. To have substituted the purchaser as a defendant, would have subjected him to liability for the costs of the suit against his vendor. This could not have been done, at the time of the purchase by him, and a subsequent statute could not be made to retroact in a manner to produce such an effect.

But in this case no such difficulty exists. The plaintiff died, and, of course, the administratrix succeeded to his interest, after the adoption of the Code. When she took upon herself the burden of her trust, she took it chargeable with knowledge that the law authorized her to be made a party to the pending suit. I think the defendants are entitled to have the suit continued in the name of the administratrix. The motion must, therefore, be granted, but without costs.

SUPREME COURT.

Crandall agt. Beach and John Doe.

Where an action is brought against two persons as partners under a particular firm name, for services rendered the firm, the summons which is served on one of the defendants only, who answers denying the several allegations in the complaint, and the plaintiff proceeds in the action against both defendants under the statute, it is not sufficient to entitle the plaintiff to a verdict against both to prove that the services were rendered for the firm, and that the defendant, who has answered, was a member of it; but it must also be proved, as against that defendant, that the other defendant was also a member of the firm.

A verdict against the defendant served only, could not properly be rendered upon proof of the services for the firm, and that he was a member.

If the name of the other member is not known, and a fictitious name is used to represent him, it must be shown who the copartner was, by some description; also that his name was not known to the plaintiff, and that the name used is fictitious.

It is not allowable to a plaintiff to use a fictitious name at his discretion; but only when he is ignorant of the true name.

Cayuga Special Term, July 1852. *Motion on the part of the defendant Beach, for a new trial on exceptions.* The cause was tried before Mr. Justice Harris, at the Monroe circuit, in April last. The facts are sufficiently stated in the opinion of the court.

W. Allen, *for Defendant Beach.*

H. E. White, *for Plaintiff.*

T. R. Strong, Justice.—This action was brought upon an alleged partnership liability of the defendants to the plaintiff, for services rendered and property sold and delivered. The defendant Beach alone answered, and he denied the several allegations in the complaint. In opening the cause at the trial, the counsel for the plaintiff stated that the work was done for a mercantile firm doing business under the name of William Beach & Co., of which the defendant Beach was a member; that he did not expect to show that John Doe was a partner in the firm, or who the other partner was; and that the name, John Doe, was fictitious, the plaintiff not knowing who was the other mem-

ber of the firm, The evidence given showed that the plaintiff had labored as a mill-wright in a mill, the business of which was carried on by William Beach & Co., and that the defendant Beach was a partner; but there was no proof as to who was his copartner, or whether the plaintiff had or had not any knowledge on that subject. A motion for a nonsuit was made on the part of defendant, upon the ground that no partnership or joint liability of the defendants had been proved as averred, which was overruled, and a verdict was directed in favor of the plaintiff; which was accordingly rendered, exceptions being duly taken.

I am of opinion that the motion for a nonsuit should have been granted. Prior to the Code it was well settled that in an action against two or more defendants as partners, or otherwise, jointly indebted, a joint contract must be proved, and the plaintiff must recover against all the defendants, or fail as to all, except in cases where a defence which was personal to one or more of the defendants, as infancy or the like, was interposed (Robertson vs. Smith, 18 *Johns.* 459, and cases cited). The rule was applicable to cases where part of the defendants only are served with the process or declaration, and the plaintiff proceeded with the action under the statute, as well as to cases where all were served; but in the former, it was only necessary to make proof of joint liability as against the defendants brought into court; as to them it was required that the proof of the joint indebtedness should be as strong as if all the defendants had appeared and defended (Whitney vs. Sterling, 14 *Johns.* 215; Halliday vs. McDougal, 22 *Wend.* 264; Van Eps vs. Dilloye, 6 *Barb.* 244; Eddy vs. O'Hara, 14 *Wend.* 221). The Code has not, in my judgment, changed this rule in cases like the present (§ 136, 274). Here the verdict was against both defendants, but it could not be sustained if it was against Beach alone. No several liability of the defendant Beach, is alleged or proved; and, therefore, a proper case is not presented for a verdict and judgment against him severally (Merrifield agt. Corley, 4 *How. Pr. R.* 272; Murray agt. Gifford, 5 *id.* 14; Fullerton agt. Taylor, 6 *id.* 259; La Farge v. Chilson, 3 *Sand. R.* 752; Ladue v. Van Vechten, 8 *Barb.* 664). It was necessary for the plaintiff to establish a cause of action, so far as Beach was concerned, against both defendants,

to entitle him to the verdict; and it was incumbent upon him to prove, in addition to what was proved by him, who was the copartner of Beach, either by name—or other description assuming that John Doe is a fictitious name—that the plaintiff was ignorant of the name of the copartner, and that John Doe was a fictitious name, used to represent him. It is not allowable to a plaintiff to use a fictitious name at his discretion, but only when he is ignorant of the true name (*Code*, § 175).

The verdict must be set aside and a new trial granted; costs to abide the event.

SUPREME COURT.

Gilchrist agt. Stevenson.

In an equity suit, commenced before the Code, the mode of reviewing a decision of a single judge since the Code of 1851, is by an appeal, and not by rehearing. And the practice under the Code of 1851, and the amendment of 1852, applies to suits commenced before the 1st day of July 1848.

Exceptions to a decision of the judge, filed after notice of the judgment, allowed to be incorporated into the record.

The practice under § 268 of the Code, considered.

Saratoga Special Term, June 1852. This cause was commenced in May 1848, and was tried at the Washington county circuit, before Mr. Justice Willard, June 1851. The decision was filed January 1852, but before filing that, the judge directed a case to be made containing the evidence, which was duly settled, and finally incorporated into the record. The decision was filed and judgment entered up, January 23d, 1852, and notice thereof given February 7, 1852; and on the 16th of February 1852, exceptions were made, filed and served by the defendant's solicitor to the decision of the court. Some orders to stay proceedings had been obtained by defendant, and he attempted to make one or two motions before, but failed because the judge holding the court could not hear them, Defendant now moved to have the exceptions incorporated into the judgment roll, to

have the case resettled and turned into a bill of exceptions, and the same signed and sealed by the judge, and for relief generally.

I. W. THOMPSON, *for the Motion.*

E. H. ROSEKRANS, *for Defendant.*

HAND, Justice.—This cause was tried before, but the judgment entered after, the Code of 1851 took effect, and before the amendments of 1852 became law. These acts are very obscure in relation to a trial by the court; but I am inclined to think that on the trial of questions of fact by the court, the decision filed by the judge should distinctly pass upon, and find all the mterial issues presented by the pleadings. If the complaint set up only general allegations of indebtedness, perhaps it would be sufficient to find, generally, indebtedness to a certain amount, notwithstanding several grounds of indebtedness were alleged. But unless the decision finds all the facts distinctly traversed, and put in a traversable form, it will be very difficult for the parties to know and protect their rights in any future suit; and the record must necessarily be imperfect. Probably, if no objection is made to a decision, finding the result in a general form, particularly in actions in which a general verdict could be given (§ 216), the appellate court would not consider the omission fatal. A party may have the facts found by the judge stated in a case; but it seems reasonable, as well as analagous to all former practice, that the issues should also be found, particularly in cases of common law jurisdiction, and when required by either party. And besides, the finding of facts in the case may be a very different thing from finding the issues, and is more like the finding of facts by referees. If the decision and judgment are contrary to the legal effect of the case as admitted by the pleadings, I think the objection can be taken without a case, and perhaps without exceptions, if the point be passed upon in the court below (Lake vs. Gibson, 2 *Comst.* 188). And a party may also within ten days after notice of judgment, except to decisions on matters of law, arising upon the trial, in the same manner and with the same effect, as upon a trial by a jury (*Code*, § 268). It is not clear what are the nature and office of these exceptions.

By the next paragraph of the section, "either party desiring a review upon the evidence appearing on the trial, either of the questions of fact or of law," may make a case or exceptions in like manner as upon a trial by a jury, except that the judge in settling the 'case,' must briefly specify the facts found by him; and his conclusions of law. This case, or the exceptions, must be made within ten days after notice of judgment, or within such time as prescribed by the rules of the court. The exceptions in these two cases, it would seem, are not the same. In one case, they must be made in ten days; in the other, within that time, or within the time prescribed by the rules. Nothing is said about a review upon the facts or evidence by the former; the latter exceptions certainly should be accompanied by a statement of the facts out of which the question of law arose (Price vs. Powell, 3 *Comst.* 322). Both merely raise questions of law; a review of the facts and evidence being the office of a case. Upon a case, questions of law may be raised at a general term: and, it would seem, the exceptions may be incorporated therein, and facts and conclusions of law, as we have seen, are now inserted (§ 264, 268). The phraseology is very much changed from that of the Code of 1848. And possibly the office of a case may have thus been changed in respect to taking a cause to the Court of Appeals; but, probably, the former discrimination, between case and a bill of exceptions, now called "exceptions," will still be made in that court (Livingston vs. Radcliff, 2 *Comst. R.* 189; *Code*, §§ 268, 264, 348. And see Borst vs. Spelman, 4 *Comst.* 284; Esterly vs. Cole, 4 *id.* 502). Section 264 implies that it may become necessary to separate exceptions, when incorporated in a case. The exceptions in both cases, provided for in § 268, are to be taken in the same manner as upon a trial by a jury. Certainly a party can not on many questions of law, as admissions of evidence, &c. &c., be allowed to except for the first time after judgment. The fair construction of that section is, that, as to all decisions made during the progress of the trial, the exceptions must be taken at the time, as on trials by a jury. But as to decisions upon matter of law, not made until after the cause is submitted, those may be excepted within ten days after notice of judgment. Thus should the judge, after taking time to make

a decision, grant or refuse a nonsuit: or allow or reject a claim or title, &c.; these come within the first part of the section, and the exception must be made within ten days after notice of judgment. If the exception be for some supposed error apparent on the record; that is, if any decision even on a trial of an issue of fact, be inconsistent with the pleading, I do not see why he may not except, without reference to any thing that transpired on the trial. But if the error is predicable only of something that took place there, I think the exception must still be accompanied with a history of so much of the trial as will make the exceptions apposite and intelligible, whether the exception be made before or after judgment.

If a case is made, that also is attached to the record, or may afterwards be annexed by the order of the court. And on appeal to the general term, as I understand sections 268 and 348, all questions properly raised, whether of law or of fact, to a certain extent, can there be examined.

In this case, the judge who tried the cause, before judgment, ordered a case made, containing the evidence. This was a precautionary measure, probably, as there seems to have been some doubt as to the mode of presenting testimony taken by the court orally, in old equity suits.

On the argument of this motion, I had some doubt whether the practice under the Code, applied to this case; but I am inclined to think it does. The act to facilitate the determination of existing suits, &c., passed April 12th, 1848, as well as the reenactment of that act, April 11th, 1849, applied sections to existing suits; though not those relating to trial by the court. Both acts recognized the right to a rehearing in equity suits. But in the revision of the Code in 1849, a title (§ 456–461), entitled "Provisions relating to existing suits," is added, further affecting existing suits. By the amendments of 1851, § 459, of the Code of 1849, is entirely changed; and it is declared that "the provisions of this act apply to future proceedings in actions or suits heretofore commenced and now pending," in the cases therein specified; and in fact, takes up every suit in its then present state. This amendment was passed a year after the last revision of the supplementary act, and if it applies only to suits

commenced under the Code, is supererogatory or senseless; for the Code applies to those of course (see Church agt. Rhoades, 6 *How. Pr. R.* 281, GRIDLEY, J.; *Whittaker's Prac.* 724, *et seq.*).

If this be so, this cause can not be reheard under the judiciary act, but can only go to the general term by appeal, as in other cases tried by the court. It follows too, that the practice under the Code of 1851, applies to this suit after that Code took effect, except as changed by the Code of 1852.

The papers do not show that the issues were not all found; nor do they state that defendant has made any effort to appeal; though I understood counsel, there was some understanding upon that subject. The exceptions do not seem to have been settled, but it is not pretended that there was any objection taken to them.

Under the circumstances of this case, I think, if the cause should be appealed after the exceptions are annexed, the court, at general term, would hear the argument upon the whole record, as if the exceptions had been incorporated into the case. If the cause should go farther, it will be for the court to decide, upon a proper application, whether the case and exceptions shall be incorporated into one bill of exceptions.

The exceptions must be annexed to the record, and the rest of the motion denied, without prejudice to defendant's right to move to turn the case into exceptions, after a decision by the general term.

SUPREME COURT.

N. Hinds 2d agt. Tweddle and Darlington.

The Code no where authorizes a general demurrer to a complaint. The intention of § 145 is to prohibit general demurrers; and it governs the form and manner of demurring, and applies to all the subdivisions of § 144.

A demurrer which alleges "that several causes of action are improperly united in the complaint," is nothing but a *general demurrer*, and is, consequently, unauthorized.

(*This view of demurrers agrees with Purdy agt. Carpenter and Ferris, 6 How. Pr. R.* 361, *and is adverse to some of the cases there mentioned.*)

The Code has not changed the common law rule of pleading, so as to deprive the party of the right to waive the tort, and bring an action on the contract.

Where the plaintiff could have brought an action in tort against the defendants as bailees, but actually counted in assumpsit for a breach of the implied contract (*Humphrey's Precedents*, 622), *Held*, that there was no misjoinder of actions (tort and assumpsit) by such a count being connected with one admitted to be clearly in assumpsit.

——— *Special Term, Nov.* 1852. *Demurrer to complaint.*

The complaint contains two counts. The first count in the complaint alleges that plaintiff on the 22d November 1846, delivered to defendants a quantity of hops to be taken care of, and returned to plaintiff when requested, and that "defendants without the leave or license of plaintiff, used and appropriated said hops, or the avails thereof, to their own use, and thereby the said defendants became indebted to the said plaintiff in the sum of $462·50, with interest thereon from said 25th day of November 1846." The second count is for $1000, money had and received, April 1, 1852.

The defendants "demur to plaintiff's complaint, and specify as the grounds thereof, that several causes of action have been improperly united in said complaint."

The plaintiff's counsel insists that the demurrer is defective and should be disregarded, for the reason that it does not conform with the provisions of the Code, it being a general demurrer, wholly omitting to specify the grounds of objection to the complaint.

OTIS ALLEN and L. J. BURDITT, *for Defendants.*

C. FIELD, *for Plaintiff.*

CRIPPEN, Justice.—Demurrers to complaints are authorized by § 144 of the Code; the 5th subdivision of this section declares that several causes of action improperly united in the same complaint, is cause of demurrer. It is enacted by § 145, that every demurrer shall distinctly specify the grounds of objection to the complaint, and unless it do so, it may be disregarded.

It is undoubtedly true that the demurrer to the complaint in this case is general in form.

The rules and practice of the court prior to the Code, did not allow this general form of demurrer without adding thereto a specification of the cause of demurrer The party demurring was required to briefly and plainly specify the objections in matters of substance as well as those of form, upon which he intended to rely on the argument of the demurrer (*Sup. Court Rules*, 88, 89 *of* 1845, *and* 80 *and* 82 *of* 1847).

In my judgment the Code has no where authorized a general demurrer to a complaint. The form and manner of demurring is governed by § 145. It applies to all the subdivisions of § 144. The intention of § 145 is to prohibit general demurrers, otherwise it is entirely useless,without meaning or application.

I am aware that there is a conflict in the decisions upon this point. In my opinion the above sections should be so construed as to give effect to both. It is manifest that the general causes of demurrer to a complaint are intended to be specified and limited by § 144. In demurring, however, it is not sufficient to merely repeat the language of one of the subdivisions of that section, and rely upon that as a sufficient specification of the grounds of objection to the complaint. If this is held to be sufficient, it virtually repeals section 145. This section expressly enacts that the demurrer shall *distinctly specify the grounds* of objection to the complaint, and unless it do so it may be disregarded. Without such specification, the plaintiff is not apprised of the grounds of the alleged improper union intended to be reached by the demurrer; whether it consists in a union of two separate causes of action in violation of the provisions of § 167 of the

Code, or in a union by blending together in one count, two or more causes of action which might properly be united, if separately stated as required by the last mentioned section, the plaintiff is not informed. There is no hardship in holding the party demurring to a compliance with § 145. I fully concur with Justice BARCULO in the views expressed by him in the case of Purdy agt. Carpenter and Ferris (6 *How. Pr. R.* 361). Also see *Van Santvoord's Pleadings*, 421.

This view of the case disposes of the demurrer, and entitles the plaintiff to judgment thereon.

I have examined the other question raised upon the argument, and which seemed to be treated by the counsel as the principal question in the case, and have come to the conclusion that no misjoinder exists in setting forth the causes of action in the plaintiff's complaint. It is true that two distinct claims or demands are set forth in separate and disconnected counts, but they both belong to the same class, and may be united in one action.

The first count in the complaint is in form and substance the same as the former precedents used in an action of assumpsit (1 *Humphrey's Precedents*, 622). The second count is admitted to be in assumpsit. Section 167 of the Code defines what causes of action may be united in one action, and was enacted with reference to the causes of action as they existed at common law; that section, therefore, should be construed with reference to the principles of the common law, as they existed at the time the Code was enacted (6 *How. Pr. R.* 232).

It is undoubtedly true that the plaintiff could have brought an action of trover against the defendants for having as bailees of the plaintiff, used or appropriated his hops to their own use. But according to well settled principles of law, the plaintiff had an election, either to prosecute and complain in tort for the conversion of the property, or in assumpsit for a breach of the implied contract or promise to return it or pay the value thereof.

The plaintiff has clearly elected by the allegations contained in both counts of his complaint to waive the tort, and to treat the defendants as indebted to him upon the implied contract for the value of the hops.

The plaintiff possessing the legal right to elect between the

actions in form *ex-delicto* and *ex-contractu*, and having by the form of his complaint elected the latter, in both counts thereof, it follows that there is no misjoinder of actions for which a demurrer can be sustained.

Previous to the Code the law was well settled in this state, that the plaintiff might waive the tort in a case for the conversion of property, and declare in an action of assumpsit to recover the value thereof (Putnam vs. Wise, 1 *Hill*, 240, *note*: Cummings v. Vorce, 3 *Hill*, 283; Berley v. Taylor, 5 *Hill*, 584, *note a.* Osborn vs. Bell, 5 *Denio*, 370; Moran vs. Dawes, 4 *Cow.* 412; Orange Bank vs. Brown, 3 *Wend.* 158). The true rule is stated in Young vs. Marshall (8 *Bing.* 43), which is that no party is bound to sue in tort, where by converting the action into an action of contract he does not prejudice the defendant. Generally speaking, it is more favorable to the defendants to be prosecuted upon contract than tort, for that form of action lets in a set off, and also releases the body from imprisonment on the judgment. The plaintiff in such case waives his claim to damages for a wrong committed by the defendant, and seeks to recover only the proceeds or the value of the property. It would be difficult to find a case in which the defendant would be prejudiced by a waiver of the tort and resorting to the implied contract for redress.

I am not prepared to adopt the conclusion that the legislature intended by any provisions of the Code, to change the common law rule, so as to deprive the party of the right to waive the tort, and bring an action on the contract. No such provision or enactment has fallen under my observation. I am unwilling to demolish well settled principles of the common law, by inferring or spelling out an intention of the legislature to do so. Experience has shown that every alteration of the law by the Code has not worked a change of principle; and unless the statute has clearly made a change, the safer rule is, to stand by the land marks of the common law and protect them against crude and hasty legislation. My conclusion is that the demurrer is not well taken upon the last point. The plaintiff therefore is entitled to judgment with leave to the defendants to answer the complaint in twenty days, on payment of $23 costs of the demurrer.

SUPREME COURT.

In the matter of the application of Benjamin Welch Jr. agt. James M. Cook.

Upon the rendition of a regular judgment of *ouster* in the suit of the People against a public officer, and in favor of another individual for the office, the officer becomes actually ousted and excluded from office; and the party declared to be entitled, upon taking the official oath and filing his bond (when required), becomes *eo instanti* invested with the office, and entitled under § 437 of the Code, to demand and have the books and papers appertaining to the office.

An application before a judge at chambers, under the 51st, 52d and 53d sections of 1 *R. S.* 125, and the 438th section of the Code, to compel the delivery over to the applicant of the books and papers appertaining to a public office, is not a motion *in the Supreme Court*, nor a motion *in any suit* pending in the court. Any justice, therefore, has jurisdiction.

Such proceedings can not be considered proceedings *in the court below*, where the judgment is appealed to the Court of Appeals; nor are they even proceedings *upon the judgment*, though the judgment is used as evidence of what it determines. They have no connection whatever with the proceedings in court, but are deemed by the statute original and independent proceedings.

Consequently an *appeal* from the judgment of ouster can not in any way operate as a stay of proceedings on such an application.

Mason, Justice.—This is an application under the 51st, 52d and 53d sections of 1 R. S. 125, and the 438th section of the Code, to compel Mr. Cook to deliver to the applicant, Mr. Welch, the books and papers appertaining to the office of state treasurer.

The first question I propose to consider in this case, is the objection raised to my jurisdiction to entertain this application. By section 51 (1 *R. S.* 125), jurisdiction to entertain such proceedings was conferred upon the chancellor, any justice of the Supreme Court, circuit judge, &c.; and by the 16th section of the judiciary act of May 12th, 1847, the justices of the present Supreme Court are invested with all the jurisdiction and powers of the chancellor, the justices of the Supreme Court, vice chancellors and circuit judges (*Laws of* 1847, *p.* 323, § 16). Before the passage of this act, the chancellor and justices of the Su-

preme Court could entertain these proceedings in any part of the state, without reference to the residence of the parties. It is insisted, however, by the counsel for Mr. Cook, that by the 51st section the application must be made in the county where the parties, or some one of them reside, or in an adjoining county (*Laws of* 1847, *p.* 334, § 51). I think it is quite clear that this section does not embrace the case under consideration. The section referred to is as follows: "All motions in the Supreme Court organized by this act, both enumerated and non enumerated, shall be made in the county in which the venue in the suit shall be laid, or in an adjoining county; and if no suit be pending, or if said motion be the first proceeding in any suit, the motion shall be made in the county where the parties in such suit, or person against whom the same is made, or some or one of them, reside." This is not a motion *in the Supreme Court*, but an application to me out of court, as justice thereof (1 *R. S.* 125, § 51). Neither is it a motion *in any suit* pending in said court. It does not, therefore, fall within the first paragraph of the section. It is equally clear that it does not fall within the second paragraph, as that part of the section only applies to preliminary motions in *an anticipated suit*. This is apparent from the very language of the statute, and for the additional reason that the whole section applies only to motions *in Court*, and has no application to proceedings like the present, before a judge at chambers.

I propose in the next place to consider the effect of the judgment of the Supreme Court in the suit of The People vs. James M. Cook, the record of which is produced before me on this application. It appears by this record that it was adjudged and determined in that suit, "that Mr. Cook was guilty of usurping, intruding into, and unlawfully holding and exercising the office of state treasurer, and the rights and franchises appertaining thereto, and that he be excluded, ousted and removed therefrom, and that the applicant, Benjamin Welch jr, is entitled to the said office, and the rights and franchises thereof." The rule is an elementary one in our laws that the judgment of a court of competent jurisdiction directly upon the point is, as evidence, conclusive between the same parties upon the same matter directly in question in another court (1 *Phil Ev.* 333). This rule be-

prevailed in every system of jurisprudence with which we have any acquaintance, and must prevail, not only from its obvious fitness and propriety, but because without it an end could never be put to litigation. The maxim "*nemo debet bis vexari*," embodies a principle of universal application. The judgment in such cases estops the parties, and neither can claim any thing in opposition to it.

It becomes important, therefore, to inquire what this judgment settles. It is admitted on all hands that it settles the question between these parties that Mr. Cook is a usurper of the office, and not entitled to hold the same, and that the petitioner, Mr. Welch, is entitled to the office. It is claimed by the counsel for the petitioner, that the rendition of the judgment operates *per se*, to oust Mr. Cook and exclude him from the office, and also to establish the right of Mr. Welch thereto, and that, upon taking the official oath and filing the bond required by the statute, he becomes virtually installed into the office. The counsel for Mr. Cook insists that the judgment has no such effect; that it only establishes the fact that Cook is not entitled to the office, and that Welch is; and that the judgment must be executed by some process or mandate of the court before Cook is ousted or Welch put in. This is an important question in the case, as will be seen when we come to consider the effect of the appeal from the judgment. The 441st section of the Code, which is substantially the 48th section of 2 *R. S.* 585, provides that when the defendant "shall be adjudged guilty of usurping or intruding into or unlawfully holding or exercising any office, franchise or privilege, judgment shall be rendered that such defendant be excluded from such office, franchise or privilege." By section 437 of the Code, which is substantially section 32 of 2 *R. S.* 582. It is provided that "the judgment be rendered upon the right of the person so alleged to be entitled" to the office, "and the same be in favor of such person, he shall be entitled, after taking the oath of office, and executing such official bond as may be required by law, to take upon himself the execution of the office, and it shall be his duty, immediately thereafter, to demand of the defendant in the action, all the books and papers, in his custody or in his power, belonging to the office from which he shall have

been excluded." Then comes section 438 of the Code, which is section 33 of 2 *R. S.* 582, and provides that "if the defendant shall refuse or neglect to deliver over such books or papers, pursuant to the demand, he shall be deemed guilty of a misdemeanor, and the same proceedings shall be had, and with the same effect, to compel delivery of such books and papers, as are prescribed in article 5, title 6, chapter 6 of the first part of the Revised Statutes. There is no provision, either in the Revised Statutes or the present Code,of Procedure, for the issuing of any process, or taking any other proceeding upon the judgment to remove the defendant from the office and place the party entitled thereto in possession, and none is required. The rendition of the judgment itself virtually ousts and excludes the defendant from the office. This is apparent from the language of the statute itself. The 441st section of the Code provides that the judgment rendered in such a case shall *exclude him from the office;* and that such is the effect of the judgment is apparent also from section 437 of the Code, which, as we have seen, provides that if the judgment be rendered upon the right of the person so alleged to be entitled to the office, and the same shall be in favor of such person, *he shall be entitled,* after taking the oath of office, and executing such official bond as may be required by law, *to take upon himself the execution of the office,* and it shall be *his duty immediately thereafter,* to demand of the defendant in the action all the books and papers in his custody or within his power, belonging to the office from which *he shall have been excluded.*

The statute therefore is, if judgment be rendered upon the right of the party, &c., he shall be entitled, upon taking the oath and executing the bond. to take upon himself the execution of the office, and it makes it his duty immediately thereafter to demand of the defendant the books and papers belonging to the office from which he shall have been excluded. From which he shall have been excluded by what? The statute itself furnishes the answer; for it speaks of nothing but the *rendition of the judgment,* and gives to the party entitled to the office, upon the rendition of the judgment, the right at once to take upon himself the execution of the office, on taking the oath and filing his bond

This view of the statute is greatly strengthened by the omission of the legislature to provide for any process upon the judgment, or other proceeding to remove the usurper and install the party entitled. The right to the office being established by the judgment, they have provided this summary remedy to compel the delivery of the books and papers; and if any process or proceeding of ouster were required upon the judgment to divest the defendant of the office, and install the party entitled, the legislature would undoubtedly have provided some remedy suitable to the case. Such a process, however, I apprehend, would be an anomaly in the law, and should be accompanied with some special instructions to the sheriff as to the mode of its execution. For a process to take from one man *an office*, and give it to another, would be in practice a troublesome thing to execute; and I doubt whether the sheriff could ever satisfy the party entitled thereto that he had delivered it to him, or convince the other party that he had disrobed him of it. It is insisted by the counsel for the defendant that there are some precedents to be found in the early reports in England, where the writ of seizure has been issued to seize the office or franchise into the king's hands. I have looked into these precedents, and they are all cases of a right to a franchise, such as a ferry or a market, which was capable of actual seizure upon the writ. But in the case of an office no such writ is necessary. HOLT, Ch. J., says: "*Such a case needs no writ of execution, for, in a quare impedit, if judgment be against the incumbent, the patron presents without more ado*" (The King vs. The Mayor of London, 1 *Shower*, 274, 276). And it is said, if the king's title be found to lands and tenements, the king shall be in possession by the office only; and so if the king's title be found to an office of which continual profit may be taken (*Stanf. on Prerog.* 53, 54; 9 *Coke*, 95 *b.*; 4 *id.* 58, *a.*).

I have looked very carefully into the modern reports of Westminster Hall, and I have not been able to find any such use made of this writ; and the courts in England treat these judgments as actually ousting and removing the defendant from the office. It is said, if a defendant make title to a corporation office as being elected under the mayoralty of a particular person, on issue joined, whether that person were mayor or not, a record of ouster against

him may be read in evidence to show that he was not mayor, which will be conclusive if it is not shown that the judgment was obtained by fraud or collusion (15 *Bacon's Abr.* 187, *Bouv. ed.*; Rex vs. Hebden, 2 *Strange*, 1109; *Andr. Reps.* 389; Rex vs. Grimes, 5 *Burr.* 2598).

But whatever may be the effect of such a judgment in England, I apprehend that under our statutes the rendition of the judgment operates as an actual ouster and exclusion from the office. And such being the effect of the judgment in this case, I take it to be very clear that the appeal from it can not reinstate Mr. Cook. The judgment stands in full force and effect pending the appeal, and until reversed.

It is contended, however, by the counsel for Mr. Cook, that the appeal from this judgment to the Court of Appeals, operates as a stay of all proceedings upon it. This case is governed by section 342 of the Code, which provides that the perfecting of the appeal and giving the undertaking shall stay all proceedings *in the court below upon the judgment appealed from*, except when the judgment directs the sale of perishable property. The very language of the section confines the stay to proceedings in the court below upon the judgment. The proceedings instituted before me are not proceedings *in the court below;* nor are they proceedings *in the suit* (1 *R. S.* 125, § 51, 52, 57). They are not even proceedings *upon the judgment;* though the judgment, it is true, is used as evidence of what it determines. Our courts have construed the stay of proceedings provided by the statute on appeals, as confined to proceedings *in the suit* in which the decree or judgment appealed from is made (4 *Sandf. Ch R.* 390; 3 *Paige R.* 381, 385; 3 *Sandf. S. C. R.* 740). The stay does not prevent the party who is successful below from prosecuting in another court, while the appeal is pending, a demand which was involved in the former suit and not decided by the decree (4 *Sanf. Ch. R.* 390); and it was held in the case of Buckley vs. Keteltas (3 *Sandf. S. C. R.* 740), that the filing with the county clerk of a docket of a judgment entered in that court, and docketing the same with such clerk, is not a proceeding which is stayed by an appeal from the judgment to the Court of Appeals, for the reason that *it is not a proceeding in the court below.* The court say, in

that case, "*After the perfecting the appeal no proceedings in this court can be had.*" And they add: "*A proceeding in this court, we understand to be an act which is done by the authority or direction of this court, express or implied.*" It can not be pretended that these proceedings, authorized *by the statute* to be instituted before a judge at chambers, are to be deemed an act done by the authority or direction of *the Supreme Court.* They have no connection whatever with the proceedings in the court; but they are deemed by the statute original and independent proceedings, having no necessary connection with the suit. It is true, the party uses that judgment as evidence in these proceedings, but that does not make them proceedings in the suit or upon the judgment. This judgment of ouster is conclusive upon the defendant until reversed (Rex vs. Hebden, 2 *Strange*, 1109; Symmes vs. Regem, *Cowper*, 497; Rex vs. Hearle, *Strange*, 628; 8 *Cow. R.* 721, 722); and the judgment is presumed to be in full force, though a writ of error be sued out, when the record does not show any disposition of the writ of error (Gee vs. Nicholson, 2 *Stewart R.* 512).

It has been shown, I think, that upon the rendition of the judgment in the suit of the People vs. Cook, he became ousted and excluded from this office; that upon taking the official oath and filing his bond, Mr. Welch became *eo instanti* invested with the office (*a*), and entitled, under § 437 of the Code, to demand and have from Mr. Cook the books and papers appertaining to the office; and that the appeal from that judgment does not affect the rights of these parties on these proceedings, while that judgment remains unreversed. I feel the less embarrassment in acting upon that judgment, as it was rendered upon a review of the trial at the circuit, by the full bench, after an elaborate argument and mature deliberation; and as I have the precedent of a learned jurist in a similar case. I refer to the decision of Judge KENT, reported in 5 *Hill R.* 633, where he uses the following language: "Under what circumstances a judge is authorized to interfere in this informal way, is not clearly defined. It was contended before me, in an able argument on an application similar to the

(*a*) This is what is called *taking possession of the office* (The People vs. Stevens, 5 *Hill*, 625, per NELSON, *Ch. J.*).

present, growing out of the dispute in the sixth ward of the city of New York (see 3 *Hill*, 42). that the judge could never rightfully proceed against an officer *de facto*—that is, one holding or exercising the office under color of claim or title. In that case, however, I deemed it proper to act against the officer *de facto*, because the Supreme Court had decided (though a writ of error was then pending), that the title of the claimant was good and legal." He adds: "I considered it my duty to act upon this question without speculating upon the possibility of its being reversed, regarding the Supreme Court as the appropriate tribunal for the determination of legal questions, the decisions of which, while unreversed, all inferior officers are bound to respect and obey."

The present is a much stronger case than the one before Judge KENT, for here the court have given a judgment of ouster against the defendant, while in the case *ex parte* Heath (3 *Hill R.* 42), upon which Judge KENT acted, the case was before the Supreme Court on mandamus, and they had only decided upon the right of the relator, but had not given a judgment of ouster, against the party holding and exercising the office. It would be a very easy matter to vindicate the law upon the highest considerations of public policy and expediency as we have determined and administered it in this case. But as we have nothing to do, but administer the law as we find it, I will only say, it seems to me to be eminently right and proper that after the deliberate judgment of the Supreme Court, giving this office to Mr. Welch, he should be put in possession of the books and papers belonging to it. There are now none of the difficulties in the case which existed at the time the former application was made to Justice Watson. The stipulation has expired by its own limitation, and the judgment of the Supreme Court has been amended in the respect in which it was deemed to be defective. I therefore order and direct, that the respondent deliver said books and papers to the petitioner, and as the statute has made this the only mode of enforcing the delivery, the order must be that a warrant of commitment issue to the sheriff of the county of Albany

SUPREME COURT.

The People ex rel. Barnet agt. College of Physicians and Surgeons.

The motion to quash a writ of mandamus is in the nature of a demurrer, and, *pro hac vice*, admits the facts recited in the writ.

In doubtful cases the court will not determine on the motion whether the writ lies or not, but let the mandamus go, that the matter may come before them on the return.

Quere, whether a right of visitation is not vested in the Regents of the University over eleemosynary corporations, chartered by them, where no such power is *expressly* reserved or given by law.

New York Special Term, August 1852. This was a motion to quash an alternative mandamus.

The alternative mandamus alleges that, by virtue of the matriculation and payments, tickets and other acts therein mentioned; and of the charter, by-laws, rules, regulations and conditions, also therein mentioned, the relator became and was entitled to hold the franchise, position or office of student or member of the college, and candidate for the degree of doctor of medicine, and to enjoy all the rights and privileges and franchises therewith connected, or thereunto in any way belonging, and to attend the lectures and cliniques as such candidate or student, and to pursue the medical studies to their completion, and to receive from the college, if found duly qualified, pursuant to the said requisites and conditions, the degree of doctor of medicine.

Edmonds, Justice.—The motion to quash the writ of mandamus is in the nature of a demurrer. and admits the truth of the foregoing allegations, as well as that which follows, namely, that the trustees of the college, without legal or sufficient cause, and in an *ex parte* and illegal manner, have removed him from the said position as student and candidate for a degree, and deprived him of the valuable franchise thereto pertaining.

So that it is conceded that the defendants have in an arbitrary and illegal manner deprived the relator of a right which he had acquired by his payment to them, and their receipt from him of the required fees, and by his full compliance with their rules and regulations.

The relator's rights, and the wrong done to them by the defendants, being thus clearly established in the record, the only question presented to me is, whether a remedy can be afforded by means of a writ of mandamus? Not whether he has any remedy, but whether it can be sought for and administered to him in this form.

On the part of the defendants, it is insisted that the college being an eleemosynary corporation, is subject only to the visitation of its trustees, and that any wrong committed by the college can be redressed only by those trustees; and that as no appeal from their action has been provided in the act of incorporation, there is none in fact, and their determination is final. And the language of Lord Holt, in the leading case of Phillips vs. Bury (*Skin.* 475), is quoted; "The next point is no more than this; whether the justice of the sentence (of the visitor) be examinable in any of the courts of common law? That is, first, whether the sufficiency of the sentence as to the cause be examinable in the common law courts; and secondly, whether the truth of that cause, suppose it to be good and sufficient to ground the sentence, if true, can be inquired into and examined. And I think the sufficiency of the sentence is never to be called in question, nor any inquiries to be made here into the reasons or causes of the deprivation. If the sentence be given by him, that is a visitor, created so by the founder or by law, you shall never inquire into the validity or ground of the sentence." And again, "If he (the visitor) hath jurisdiction and cognizance of the matter and person, and he giveth sentence, there is no appeal, if the founder hath not thought fit to direct one. That an appeal lieth to the common law courts is without precedent."

Such, undoubtedly, is the doctrine laid down one hundred and fifty years ago, and followed in numerous instances since.

There are, however, two considerations which cause me to doubt its controlling power over the case now before me.

One is, that it does not clearly appear that there are no visitors beyond the trustees. Upon the facts, as they appear now in the papers, I might well infer that there were none. Yet it may well be that some power of visitation has been reserved by the Regents of the University; some right reserved or retained in

that body to supervise and guard against an arbitrary and unjust exercise of power by the officers of the literary institutions established by them. And if there is such power of visitation, it ought, clearly, to be applied to before resort be had to the common law courts.

It is, undoubtedly, true that in the absence of any express provision for visitation, the trustees themselves became visitors, but the fact of the absence of any such provision is not clearly made out, as it may be on a return of a mandamus, and until such return shall be made, I can have no certain assurance that I shall be determining the question involved, on a correct basis of fact.

The other consideration is this, that the courts have sometimes departed from the strict rule laid down by Lord Holt. In Rex vs. University of Cambridge (*Strange*, 558), the return, it was said, fully justified the sending a mandamus as it showed the power of the vice chancellor and congregation was only to deprive for a reasonable cause, and as it was not pretended there was any visitor or any other jurisdiction to examine into the reasonableness of the deprivation but that of the court.

In Rex vs. Dr. Askew (4 *Burr.* 2188), Lord Mansfield holds this language:

"There can be but little doubt that the college are *obliged*, in conformity to the trust and confidence placed in them by the crown and the public, to *admit all* that are *fit;* and to *reject all* that are *unfit*. For under the reason and spirit, and true construction of this charter and this act of parliament, *no* person ought to be *suffered to practice* physic, *but such only* as have skill and ability, and have dilligently applied themselves to the study, and are well grounded in the knowledge of it; and on the other hand, *all* persons who *are so qualified*, and have bestowed their time and money and labor in the proper studies that tend to such qualifications, have a *right* to be admitted to exercise and practice their profession. And the *public* have also a *right* to the assistance of such a person, who has by his labor and studies rendered himself capable of serving the public, by giving them proper advice and directions.

It is true that the judgment and discretion of *determining* upon this skill, ability, learning and sufficiency, to exercise and

practice this profession, is trusted to the College of Physicians; and this court will not take it from them, nor interrupt them in the *due and proper* exercise of it. But their conduct in the exercise of the trust thus committed to them, ought to be *fair, candid* and *unprejudiced;* not *arbitrary, capricious,* or *biassed;* much less warped by *resentment* or *personal dislike.*"

In *Dr. Goddard's case,* a mandamus was moved for to the College of Physicians, for restoring him to the fellowship of the college, and some doubt was made, whether a mandamus would lie for this, or for any fellowship in any of the colleges in the universities? But at last it was granted, and said that it should be considered on the return, whether it lies or not. And afterwards in *Trinity* term a return was made, whereby it appeared that a fellow (here) is not, as fellow, member of a corporation, but is a kind of officer, as a manciple is to a college; and the return was adjudged good and no restitution " (*Levinz's Reports, vol.* 1, *p.* 19).

In doubtful questions, the court will not determine on motion, but let the mandamus go, that the matter may come before them on the return. In which case the parties have their remedy of reviewing the decision, which they may not have on the motion, and I can say, with the court in the case in *Strange,* " it is a consideration of great comfort to me, that if I do err, my judgment is not conclusive to the party, but my mistake will be rectified, and so injustice not be done."

Therefore, it is, the question being one of doubt, and not intending to express any opinion upon it, that I deny the motion to quash the writ of alternative mandamus; it does not, however, follow that a peremptory writ should be awarded. It might be so, in the discretion of the court, and that discretion would be exercised, where the grounds on which the motion is made to quash the writ were frivolous. Here they are not so, but involve a grave question, which can properly be raised only on a return.

The true course, then, will be, to extend the time to make a return and grant a peremptory writ, unless the return to the alternative writ be made within twenty days after the service of the rule hereon, or within such further time as a judge at chambers may grant. Let a rule to that effect be entered.

SUPREME COURT.

BEARDSLEY agt. STOVER.

Before the last amendments of the Code (1852), the court, by the terms of the 173d section, could only allow such amendments to pleadings as would not change substantially the claim or defence. But by the amendment of that section this restriction is now limited to those cases in which amendments are allowed for the purpose of conforming the pleading to the facts proved. In all other cases the court may, in its discretion, allow any allegations material to the case to be inserted in the pleading, even though it change entirely the cause of action or defence.

It seems, that the second subdivision of § 150, as amended, changes the law of set off, so as to allow a defendant to set up any counter claim arising on contract, whether it would have been admissible under the former law of set off or not; and even though the plaintiff's claim be one against which a set off could not have been formerly interposed, provided the action is upon contract.

Albany Special Term, May 1852. *Motion to amend, &c.* The action was commenced in August 1850, to recover damages for an alleged breach of a special agreement. Issue was joined on the 10th of March 1851, by the service of a reply to the defendant's answer. The cause was noticed for trial at the Rensselaer circuit in April 1852, and, when reached on the calendar, was referred.

The defendant states in his affidavit, upon which the motion is founded, that the plaintiff is indebted to him to an amount exceeding $4000, for a cause of action arising upon contract, and existing at the time of the commencement of this action, and that the plaintiff is insolvent. The motion is for leave to add to the defendant's answer a counterclaim, founded upon this alleged indebtedness.

E. F. BULLARD, *for Plaintiff.*

A. B. OLIN, *for Defendant.*

HARRIS, Justice.—The plaintiff's claim being for the recovery of unliquidated damages arising from the defendant's breach of his contract, the defendant, although the plaintiff might have

been indebted to him, when the action was commenced, to an amount exceeding the plaintiff's damages, could not have set off his debt against such damages. But the defendant's counsel supposes that, by a recent amendment of the Code, he may avail himself of his set off. A defendant is now authorized to set up, by way of defence, any new matter constituting a counterclaim, when such counterclaim arises upon contract. The plaintiff's action being founded upon contract, and the defendant having a cause of action also arising on contract, and the same having existed at the time the suit was brought, it would seem that the case is brought within the second subdivision of the Code as now amended.

Before the recent amendments of the Code, there would have been some difficulty in allowing the proposed defence to be inserted in the answer. By the terms of the 173d section, the court could only allow such amendments as would not change substantially, the claim or defence. But by a very slight change in the language of the section, this restriction, which before was general, is now limited to those cases in which amendments are allowed for the purpose of conforming the pleading to the facts proved. In all other cases, I understand the court to be invested with the power, in its discretion, to allow "any allegations material to the case" to be inserted in the pleading, even though the effect may be to change entirely the cause of action or defence.

In this case, I think it may be in furtherance of justice to allow the defendant to amend his answer by inserting as a new defence his counterclaim against the plaintiff. He must be permitted to do so upon payment of plaintiff's costs of preparing for the trial before the referee, and the costs of opposing this motion. The plaintiff will have the usual time to reply to the amended answer. It would have been proper, had either party desired it, to vacate the order of reference, but as nothing was said upon the subject, upon the argument of the motion, the reference may stand, but proceedings must be stayed until the new issue is completed.

SUPREME COURT.

GREENE agt BATES

The Code (§ 121) provides, that an action may be continued by or against the representative of a deceased party, *on motion*, at any time within one year, or afterwards, *on a supplemental complaint;* but is silent as to the practice to be pursued, when such supplemental complaint becomes necessary by the lapse of the year without revival.

Held, that the former practice in Chancery must be regarded as furnishing a mode of proceeding in such a case.

The court accordingly ordered such supplemental complaint to be filed within thirty days, or that the complaint in the original suit be dismissed.

Chenango Special Term, August 1852. *Motion that the cause be continued in the name of the plaintiff's executrix.* The action was commenced in December 1847. Issue was joined in January 1848. The plaintiff died in April 1851, and his widow became the sole executrix of his last will and testament.

HOTCHKISS & SEYMOUR, *for the Motion.*

DICKINSON & TOMPKINS, *Opposed.*

MASON, Justice.—The time has gone by when the administratrix of the plaintiff can move for an order continuing this suit in her name under section 121 of the Code. She may, however, revive or continue the suit on an application, and leave obtained, to file a supplemental complaint under this section. The Code is entirely silent as to the practice to be pursued in such a case, when the suit has been suspended over a year after the death of the party, except that it must be continued on a supplemental complaint when the plaintiff applies to continue it after the year has gone by. I am of the opinion, however, that we must regard the former practice in chancery as furnishing the mode of proceeding in such a case. The rule as to parties now is very nearly the former chancery rule; and when the Code is silent I think the chancery practice may be safely followed. The defendant can not move to dismiss the complaint for want of prosecution pending this defect or suspension of the suit by the death of the plaintiff (1 *Barb. Ch. Pr.* 244, and cases there cited). I do not find

that the practice however has obtained in chancery of reviving the suit by making the administrators parties plaintiff on the defendant's motion, where the plaintiff has died pending the suit. The practice seems to be, where the defendant moves, to grant an order requiring the administrators to file a supplemental bill in a stated time or that the bill be dismissed (Randall vs. Mumford, 18 *Ves. R.* 424; Wheeler vs. Malins, 4 *Mod.* 171; Potter vs. Cox, 5 *Mod. R.* 80; Pells vs. Coon, 1 *Hopk. Ch. R.* 450; 1 *Barb. Ch. Pr.* 244). I am inclined, therefore, to pursue the practice in chancery and direct an order to be entered with the clerk of Broome county, requiring the administrator to file and serve a supplemental complaint of revivor within thirty days after notice of this order, or that the complaint in the suit be dismissed with costs (see *Whittaker's new Book of Practice, pages* 298, 299 and 300). The clerk of Broome county will enter an order in this cause to the effect above indicated, the costs of this motion to abide the event of the suit.

SUPREME COURT.

VAN RENSSELAER agt. CHADWICK.

THE SAME agt. OGDEN.

The return of a sheriff, or an affidavit of a person acting in his place, of the *service of a summons*, is not conclusive upon the defendant. He may be allowed to disprove it on a *motion* to set the proceedings aside.

It is not necessary, and in many cases would be unjust, to drive the defendant to an action for a false return, for redress.

Albany General Term, Sept. 1852. *Present, Justices* PARKER, HARRIS and WRIGHT. This was an appeal from an order made at special term by Justice WRIGHT, denying a motion to set aside the service of the summons and subsequent proceedings. On the 10th June 1852, judgment was perfected in this action on the affidavit of Ezra Yager, stating that on the 9th April 1852, he served the summons on the defendant by delivering a copy to

him personally, and leaving the same with him at the town of Rensselaerville in the county of Albany, and that he knew the person so served to be the person mentioned and described in said summons as the defendant therein. The defendant moved to set aside the summons and all subsequent proceedings on his own affidavit, stating, among other things, that no summons had been served on him in this action by Yager, or any other person, either at the time and place mentioned in the affidavit of Yager, or at any other time and place, and that the first intimation he had of any action being brought against him, was from the sheriff who had the execution for collection.

On the hearing of the motion in July, no further affidavit by Yager being presented in opposition by the plaintiff's counsel, who relied on the affidavit of service accompanying the judgment, the court directed the motion to stand over till the August motion term, to enable the parties to produce further evidence on the question of service of process, and especially to enable Yager to show by further affidavit more particularly the time, place and circumstances attending the same. When the motion again came before the court in August, a further affidavit of the defendant was presented, and also affidavits of three other persons who were with the defendant on the 9th of April 1852, the alleged day of service, in his house, and on his farm where he was at work, showing that no summons was served on the defendant; that they never heard of any such service, or any attempt to serve such process on the defendant. No further or explanatory affidavit was presented on the part of the plaintiff. The judge holding the court denied the motion with $10 costs, on the ground that the affidavit of the person serving the summons was conclusive, and could not be questioned on motion. The defendant appealed from such order to the general term.

T. C. Sears, *for Defendant.*

C. M. Jenkins, *for Plaintiff.*

By the Court, Parker, Presiding J.—The evidence before the court shows very satisfactorily that the summons was never served upon the defendant. Yager, who made the affidavit of service, was not a deputy of the sheriff, but a person employed

to serve process in behalf of the plaintiff. The affidavit of service must either be a fiction fraudulently got up by the affiant, for the purpose of deceiving the plaintiff and wronging the defendant, or there has been some mistake on the part of the person making the affidavit. It is possible the summons was served upon some other person of the same name with the defendant, or that some person has personated the defendant. Whatever may be the true explanation, if any, it was certainly in the power of Yager, if he had acted honestly, to state particularly, in a further affidavit, the time of day when the summons was served, who were present at such service, if any were present, and the place in the town where the service was made The entire absence of such explanation, after the motion had been directed to stand over for such purpose, is strong evidence against the good faith of the transaction.

I can not agree to the proposition that a return of a sheriff or an affidavit of a person acting in his place is conclusive upon the defendant, and can only be questioned in an action for a false return. The plaintiff relies upon the case of Putnam vs. Mann (3 *Wend.* 202). It was there held that a plaintiff, who was a constable, might serve a summons in his own favor issued by a justice of the peace; and that his return could not be impeached in an action of trespass for an arrest under an execution issued on a judgment rendered on the return of such summons: but that if the return was false, the remedy was by action against the constable for a false return. The question decided in that case, and evidently with some hesitation, was, whether trespass or case was the proper action for redress, and the court held the only remedy to be case for the false return. It was there a question between two remedies by action. No motion could have been made in the original action to set aside the proceedings for want of service, a justice of the peace having no power after judgment to entertain such a motion. But no such objection exists in this case. This court has full power over its own process to protect against an improper use of it. Even in cases of mere irregularity, the statute authorizes the setting aside of the judgment on motion within one year after it is rendered.

In all questions relating to the proceedings in the action, the

mode of correction is by motion. The remedy is summary and effective. There is no more objection in this, than in any other case of irregularity, to a determination of a question of fact by affidavit. It sometimes happens that contradictory affidavits by the respective attorneys, are presented to the court on motion, as to the time, or place, or fact, of service of some notice or other paper in the progress of a cause. In all such cases the facts are determined by the court on the affidavits produced. It seems to follow as a necessary consequence, that if an affidavit of service, uncontradicted, is sufficient evidence to the court upon which to enter judgment, the same kind of evidence should be received, on the other side, to impeach or invalidate it. Indeed, the fact of service can be determined in no other manner: it would be inconsistent to say it should be pleaded, or set up in answer, for that practice would compel a waiver of the irregularity by appearance.

To hold the affidavit of service conclusive and drive the defendant to an action, would inflict upon him a grievous, and in many cases remediless, wrong. A judgment obtained without notice, and by a false return, might be so large as to sweep away the whole of a defendant's estate, and the remedy for damage lie only against an irresponsible third person who made the affidavit. With the ample powers of this court over its own process and proceedings, there is surely no reason for such injustice.

I think the order made at special term should be reversed with $10 costs, and the motion granted with costs.

COURT OF APPEALS.

McALLISTER AND OTHERS, Commissioners of Highways of the town of Gaines, resp'ts agt. THE ALBION PLANK ROAD CO. appel'ts.

The act to provide for the incorporation of Plank Road Companies, passed May 7th, 1847 (*Sess. L.* 1847, *p.* 226), was amended in 1851 (*Sess. L.* 1851, *ch.* 487). This amendment has reference to *appeals* from the decision of the County Court in the matter of altering or changing the location of "toll gates." And the amendment provides for the appointment, by the Supreme Court, of referees to hear, try and determine the appeal, to view the premises, &c.; and they are to proceed to a hearing of the respective parties *in the same manner as is provided by law and the rules and practice of the Supreme Court on references in civil actions;* and are to report their decision to the Supreme Court *as referees are required to report*, with the evidence taken by them, and the grounds of their decision.

The report may be reviewed by the (Supreme) Court, and judgment given thereon as justice and equity shall require, in view of the law and the facts so presented, "*and such judgment shall be final and conclusive.*

Held, that no appeal lies to this court from the judgment of the Supreme Court.

September Term, 1852. *Motion to dismiss appeal.* In January 1851, the respondents made an application to the County Court of Orleans county, to change the location of a toll gate in the appellants' road, in pursuance of § 37 of the act to provide for the incorporation of plank road companies, passed May 7th, 1847 (*Session Laws of* 1847, *ch.* 210, *p.* 226).

At a stated term of the said County Court, held on the 8th day of February 1851, an order was made, changing the location of the toll gate.

On the 19th of February 1851, the appellants appealed to the Supreme Court in the 8th district, where, on the 26th day of June 1852, the order of the Court was affirmed at the general term.

A. TABER, *for Motion.*

N. HILL JR., *Opposed.*

By the Court, WELLES, J.—The appellants have appealed to this court from the order of the Supreme Court, affirming the order of the County Court; and a motion is now made to dismiss that appeal, on the ground that the order of the Supreme Court is not appealable.

Commissioners of Gaines agt. Albion Plank Road Co.

It is provided by the section of the plank road act referred to (§ 37), that the commissioners of highways may, on at least fifteen days written notice to the president or secretary of a plank road company, apply to the County Court for an order to alter or change the location of a toll gate. The court on hearing the parties, and on viewing the premises, if deemed necessary, shall make such order as shall be deemed just and proper; and either party may, within fifteen days, appeal from such order to the Supreme Court, on giving such security as the County Court shall require. The same section declares that the decision of the Supreme Court on such appeal "*shall be final in the matter.*"

The amendment of 1851 (*Sess. L.* 1851, *ch.* 488), directs the Supreme Court, in case of such appeal, on motion of either party, on due notice, to appoint three referees, to hear, try and determine the appeal. The referees are to view the premises and the location of the gate affected by the order appealed from and are to proceed to a hearing of the respective parties in the same manner as is provided by law and the rules and practice of the Supreme Court on references in civil actions, and are to report their decision to the Supreme Court as referees are required to report, with the evidence taken by them, and the grounds of their decision.

The report may be reviewed by the court and judgment given thereon as justice and equity shall require in view of the law and the facts so presented, "*and such judgment shall be final and conclusive.*"

In this case the appeal to the Supreme Court was tried by referees, duly appointed in pursuance of the act of 1851, whose report was confirmed by the court, and judgment given thereon.

We are of the opinion that it was the intention of the legislature, that the decision of the Supreme Court upon appeal from the County Court, under the plank road act, should be an end of the controversy, and that no appeal will lie to this court therefrom. The act of 1847 declares that such decision shall be final in the matter, and the act of 1851, that it shall be final and conclusive.

It is not perceived how any effect can be given to these expressions, unless it be to take away and prevent any further

appeal or review. They certainly add nothing to the force or validity of the decision, which would be just as binding and operative in all respects without, as with them; and it will hardly do, after they have been inserted in the original act, and repeated in the amendment, to treat them as redundant, and meaning nothing.

There are reasons why we think it was intended by the legislature that these controversies should be terminated by the Supreme Court. In both the County and Supreme Courts, provision is made for a view of the premises. The decision may be properly based upon facts appearing upon such view, of which the referees can judge with far more accuracy and propriety, than would be possible for this court, upon appeal.

It was probably one object, that the proceedings should be attended with as little delay and expense, as would be consistent with the rights of the parties, and at the same time secure to them a full opportunity for investigation upon the merits. Two reviews are in effect given. One by the referees and one by the Supreme Court; and the legislature may well have supposed that the interests of the community required that litigation as to the location of a toll gate should there end. We think they have so determined, and that the provision is a salutary one.

The motion should be granted.

SUPREME COUR .

Bogardus the elder agt. Parker and others.

A widow's claim for dower of real estate is not subject to a set off for damages, nor for moneys due, nor for the receipt of rents and profits of the whole of the lands in which she claims dower.

Nor, where *she* claims no damages, can such set off be interposed as a 'counterclaim' under the Code.

The counterclaim allowed by the Code in an action not arising on contract, must arise out of the transaction set forth in the complaint as the foundation of the plaintiff's claim or be connected with the subject of the action.

New York Special Term, October 1852. The plaintiff claims dower in certain lands as the widow of General Bogardus, and

that her dower may be awarded and set off to her, and for other relief. She does not allege that any of the defendants are in possession, and does not claim to recover damages against them.

The defendants in their answer allege that she has been in the possession of all the rents and profits of the lands since her husband's death; and that the amount thus received by her exceeds the value of the dower claimed by her; and prays that an account of the value of each may be taken, and the one set off against the other, and that she be adjudged to pay to the defendants, the heirs of General B. any excess of rents received by her beyond the value of her dower. To this answer there is a demurrer.

—— ——, *for Plaintiff.*

—— ——, *for Defendants.*

MITCHELL, Justice.—It is said in support of the answer, that the right of the widow to dower before admeasurement is a mere chose in action; that as such, it is not assignable at law; and from this it is inferred that it is subject to all equitable defences or set offs. The assignee of a chose in action takes it subject to all equitable defences existing in favor of others before the assignment; and it is because such assignee has no right at law, but only a right in equity that his claim is subject to such defences. The right of the wife to dower is a chose in action because it can not be enforced except by action; but it is not a personal chose or right, but a right to real estate, and was enforced by one of the old real actions, or, where damages were to be recovered, by the old mixed action, in which the right to real estate was adjudged and damages also given for the detention. The wife was not *obliged* to go into equity to obtain this right; but as dower was a favorite in the law, so the Court of Chancery chose also (by what is generally deemed a usurpation of power now too well established to be disputed) to favor the doweress by giving her relief in that court also. Although she can not assign her right, nor can a suit be brought for it except in her name, in this she is like an heir at law of an ancestor who died, owning lands held by another adversely to him. Her claim to the land is no more subject to a set off for damages or for moneys due, than would be the right of the heir in such a case. After the

dower shall be admeasured and the heirs shall have recovered a judgment for the excess of rents received by her, that judgment will be a lien on her estate and may be satisfied out of it.

It is said that this defence may be set up as a counterclaim under the amended Code. The counterclaim allowed by the Code must arise out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or be connected with the subject of the action. If the plaintiff claimed damages, the defendants' counterclaim would come within this rule. The transaction set forth in the complaint is the marriage, seisin and death of the husband. The defendants' claim against *the plaintiff* does not arise out of those matters nor is it connected with them, but arises out of subsequent matters, namely, that *after* the death of the husband she unlawfully received rents, which belonged to them, and therefore she should pay to them damages for the rents thus unlawfully collected by her.

The demurrer is allowed, and judgment is to be for the plaintiff that she recover her dower and that it be admeasured to her, without damages for the detention of it and without prejudice to her right to set up the right to one third of the rents in any suit that may be brought against her for damages.

SUPREME COURT.

BOGARDUS THE YOUNGER agt. PARKER AND OTHERS.

In a partition suit, the complaint is not bad for misjoinder of actions, because it sets up the claim of one of the defendants to a specific lien for moneys paid to extinguish liens on the premises sought to be partitioned, and asks for an account to be taken of such advances.

Creditors holding liens, simply as creditors, need not be made parties at the commencement of the suit.

The claims of one defendant may be disputed by either of his codefendants as well as the plaintiff, and these claims may be tried and settled in a partition suit, if they involve interests in, or liens on the property sought to be partitioned.

New York Special Term, October 1852. *In Partition.* The complaint is filed by one of the daughters of General Bogardus,

against his other childern and heirs at law, and against his widow, and is for the purpose of obtaining a partition or sale of the lands of which he died seized. The complaint alleges that General B. died intestate seized of the lands described in it, and that the defendants are his heirs at law and his widow; that each heir or his representative is entitled to one-eighth of all the lands, and that the widow is entitled to dower in them. Thus far the defendants do not object; but the complaint also states that the widow was executrix of a will of the deceased not affecting these lands, and that she has paid on account of these lands over and above what she received from them, large sums of money for interest on mortgages, taxes, insurance, repairs, assessments and other charges and expenses necessary for the lands, and on account of principal moneys due on mortgages; that this was done because none of the heirs had the ability to make the payments, and was done of necessity for the benefit of the estate; and it claims that such payments are a specific lien on the lands, and alleges that the personal estate of the deceased was inadequate to pay his debts, and that there is a large amount of debts still outstanding, which were due by the deceased; and it claims that each share is liable for the payment of its proportional part of such debts, whether paid by the widow out of her own funds, or remaining unpaid.

The defendants demur on the ground that several causes of action are improperly united; namely, one for the partition of lands, and the other for the settlement of the accounts of the widow and executrix. 2d. That an action for the settlement of those accounts, if brought by one heir, should name all the heirs as coplaintiffs, or allege that they would not unite. 3d. That the complaint seeks for payment to the creditors of the estate, but does not make the creditors parties, and does not show that plaintiff is a creditor or the bill filed for them; and, 4th. That it shows no sufficient cause of action except for a partition and the ascertainment of the legal heirs and *specific* liens and incumbrances.

—— ——, *for Plaintiff.*

—— ——, *for Defendants.*

MITCHELL, Justice.—The propriety of these objections will be best understood by considering the rights of the plaintiff and of the widow. The plaintiff is the owner in common with the other heirs of the lands described in the complaint: that is, one single cause of action set forth in the complaint. Having that cause of action she is entitled to a partition of those lands, or to a sale of them if a partition can not be made; and to have the sale made free from all liens so that the purchaser can obtain a perfect title to the property. If a sale is to be made, it has been usual to make defendants all persons having any lien on the whole property, or on any undivided share, by mortgage or other specific lien, or by judgment or decree, and to state the amount due to each; and the Court of Chancery was authorized expressly to award one or more issues to try any fact contested by the parties (2 *R. S.* 330, § 85 [81]). If the deceased left debts unpaid and not secured by mortgage, it was usual for the court to inquire whether the personal estate was adequate to pay them, that the purchaser might be protected. All taxes and assessments and mortgages were paid out of the proceeds of the sales; they formed a lien on the estate, whether the unsecured debts did or not. If the plaintiff stated the amount due on any of those incumbrances, and the incumbrancer or any of the other defendants chose to dispute the accuracy of the statement, they did so, and the question could be determined by a reference or on issues ordered by the court to be tried; and now the court can still order such a reference under its power to order one when the taking of an account shall be necessary for the information of the court before judgment (*Code*, § 271). It is no more an objection now than it was formerly, that the different defendants do not serve their answers on each other; if they have adverse claims, the court may give judgment for or against one or more of several plaintiffs, and for or against one *or more of several* defendants, and it may determine the ultimate rights of the parties on *each* side, as between themselves (*Code.* § 274). All this it is admitted by the defendants may be done, where a defendant has a specific or a general lien, by judgment or decree; his claim may be disputed by any of his codefendants or by the plaintiff, and if the investigation of that claim involves an inquiry into

payments made to him and moneys received and paid out by him as agent or as executor, or otherwise, that would be no objection to its being done in the partition suit, because the lien is to be paid, and that involves the question of the amount of the lien. Because a variety of questions and some of them very complicated, may arise in ascertaining the amount due on any lien in a partition suit, it does not make it more improper to make the holder of that lien a party, than if the amount could be ascertained simply by the endorsements on the bond; nor does the examination of a long account of receipts and expenditures of one acting as executor, and which is necessary for ascertaining the single fact of the extent of that lien, make it more improper to make such a one a party as a lien holder than if the amount due on such lien could be ascertained by an examination of a bond and receipt only. These inquiries are all incidents to the one cause of action, the ownership of lands in common, and to the right to have that land sold free from incumbrances, and to have the incumbrancers made parties to effect this purpose.

It is unnecessary to say whether the creditors at large would have any lien on the proceeds of sale, or whether this court would allow the proceeds to be distributed without protecting their rights and so protecting the purchasers from them (see 1 *Edward's Ch. R.*, Mathews vs. Mathews), for here the widow claims not as a creditor at large, but as having a right to stand in the place of those whom she paid and who hold liens by mortgages and for taxes and assessments; all specific liens on the estate.

She *claims* the right to be subrogated in the place of those who once held these liens, and that she is now entitled to the same liens: she is a necessary party as a dowress, and when she comes to set forth the full grounds of her claims, as she will be entitled to do and as the plaintiff is not bound to do, she may show not only that the debt is justly due to her, but that she is to be subrogated to the rights of the former lien holders. That can be done on the reference as to title and liens by special instructions to the referee.

The plaintiff has an interest in having all liens on the estate discharged; she or her estate is liable for a proportional part

of the debts of the estate, and she has a right to have it ascertained in this action what is the amount of all or any of those debts, so far as they may affect any of those lands or herself as an owner of them. For this reason, although not a creditor herself, she is interested in having these creditors paid, and in having it determined how much each of the defendants, as well as herself, should pay of the debts; and for that purpose she need not now bring in the creditors; but must bring in the heirs at law.

The demurrer is to the *whole* complaint; in that it is clearly too broad; it must be overruled with costs to abide the event.

SUPREME COURT.

SMEDES agt. WILD.

An agreement declared void, for indefiniteness, uncertainty and gross inadequacy of consideration.

Interest allowed on the loan of money, where a chattel mortgage given to secure its repayment was silent as to interest.

New York Special Term, November 1852. The defendant loaned the plaintiff $100, to enable her in part to purchase the furniture of a boarding house, taking a chattel mortgage on the whole, valued at about $300, as security. Nothing was said about the payment of interest; but another agreement drawn up by the defendant, was executed in the following words:

"Know all men by these presents, that whereas the undersigned, John Wild, is about to lend to Matilda C. Smedes, also undersigned, the amount of one hundred dollars, to enable her to purchase out a certain boarding house at No. 41 Forsyth street, in the city of New York; and whereas in consideration thereof the said Matilda C. Smedes hereby covenants and agrees that the said John Wild shall receive out of the profits of said boarding house one clear half of the same, payable at such times as shall be hereafter agreed between the parties hereto.

In witness, etc. etc. Signed by the parties, with their seals affixed.

Proceedings to sell under the mortgage having been instituted, the plaintiff asks for an injunction to stay them.

—— ——, *for Plaintiff.*
—— ——, *for Defendant.*

ROOSEVELT, Justice.—There is no sufficient averment in the complaint to raise the question of usury. To warrant a demand for relief on that ground, a case must first be made. Besides, the mortgage contains no stipulation for the payment of interest, whether more or less than the legal rate. It merely provides for the repayment of the principal. From the collateral agreement, however, executed about the same time, it would seem that the lender was to be compensated (instead of interest) by a participation in the profits of the boarding house, to the extent of one clear half. In other words, in lieu of one dollar and seventy-five cents, which would have been the lawful interest, he was to have an indefinite compensation, depending on the success of the establishment; but he was to bear no losses, and to have his principal returned at all events, undiminished, in one, two, three, four and five months, by equal installments of $20. And how were these profits to be determined—how much was to be allowed for the plaintiff's services—when were the accounts to be adjusted—how long was the arrangement to continue? On all these points the agreement is silent. It merely provides that the one half of the profits is to be payable to the defendant "at such times as shall be hereafter agreed between the parties."

But suppose no time can be agreed upon—and none has been, or is likely to be—what then becomes of the arrangement? The defendant, as between him and the plaintiff, is not a partner, and has no control over the house; and the plaintiff, for aught that appears, may stop the house, and of course stop the profits, whenever she pleases. Such an agreement is clearly void.

It is void for its palpable indefiniteness and uncertainty, to say nothing of its gross inadequacy. The latter objection, however, is too prominent to be overlooked. How could a court, exercising equity as well as common law powers, give effect to a contract between a business man and an inexperienced woman, requiring the latter, at her own expense and risk, and with

her own care and labor, to fit up and conduct a boarding house establishment, for an indefinite period, and to pay one half of the profits to the former, as an equivalent for the use of one hundred dollars for the average period of three months?

The defendant, however, is entitled to his money actually loaned, and to the benefit of the mortgage security on the furniture, if he consents to relinquish the oppressive collateral agreement. Equity also seems to require the payment of interest, if other profits are denied.

An order will, therefore, be entered continuing the injunction, unless the defendant consents to accept that amount, to be paid within thirty days, and to cancel the collateral agreement.

SUPREME COURT.

Davis, &c. agt. Garr adm'r, &c. of Mitchell.

On a sale of lands, the terms were that promissory notes should be given by the purchaser; the vendor was not to give a deed until the notes were paid, and if any of the notes were unpaid at maturity, the vendor should, on due notice (as specified) resell the lots at the risk of the purchaser. *Held*, that the arrangement was in the nature of a mortgage for purchase money, and the purchaser was responsible for the deficiency after allowing what the lands produced on the resale.

Leave to amend for the purpose of setting up such resale as a bar, refused.

New York Special Term, May 1852. *Motion to amend.* An action was commenced in the Superior Court in September 1845, against the defendant, as administrator, on three notes made by the intestate on 24th April 1837.

The defendant put in a variety of pleas, among others the statute of limitations, a set off in favor of the intestate, and that the plaintiffs who were *described* as trustees had ceased to be trustees.

An issue of fact was joined as to the set off, and the other pleas ended in demurrers, which were found in favor of the plaintiffs. A reference was ordered by consent in February 1846,

as to the issue of fact, and to assess the damages of the plaintiffs; the referee reported in that year in favor of the plaintiffs for the sum of $16,843·93, on which judgment was entered in January term, 1847. The defendant appealed to the Supreme Court and from there to the Court of Appeals, and the judgment was affirmed in both courts.

——, *for Plaintiffs.*
——, *for Defendant.*

MITCHELL, Justice.—The defendant now says that after judgment was given in favor of the plaintiffs on the *demurrers*, he first discovered that the lands, for the purchase of which the notes were given, were sold by the plaintiffs and bought in by the company.

The judgment to which he refers, was given in February 1846, and after that, he consented to a reference, and on the reference the amount which the lands brought on the resale were credited to the defendant, so as to reduce just so much the account against him. Knowing the sale, he chose not to apply to the Superior Court for leave to put in a plea of that resale, nor to seek any relief in that court on that account; but to allow judgment to be entered against him in that court, and then try his chance in the Supreme Court and Court of Appeals, to reverse that judgment. He now asks to open all the pleadings and allow him to plead anew. It is too late, and he has delayed too long in his application to be allowed so extraordinary a favor.

From the facts stated, it would seem most likely that the defendant concluded that the facts which he would now introduce would constitute no defence, and therefore would not trust his defence to them; and in that he was apparently correct.

The terms of sale were that if he failed to pay any of the notes, the plaintiffs should be at liberty on giving thirty days notice in a public gazette in Apalachicola, to sell the lots bought by him *at his risk* for the benefit of the company, of which the plaintiffs were trustees; the company were not to give deeds for the lands until the notes should be paid. In 1842, the notes not being paid, the trustees sold the lots pursuant to the terms of sale.

The arrangement was in the nature of a mortgage for purchase

money, with a power of sale and a liability in the mortgagor for any deficiency. Under such an arrangement the sale would be regular and the person contracting to buy would be responsible for the face of his notes and entitled to an allowance for what the lands should produce on the resale. And the referee settled the account on that principle.

If the principle were erroneous, the defendant should have taken advantage of it in the account settled by the referee; and if the resale released the defendant's intestate from liability on the notes instead of entitling him only to a deduction of the proceeds of the resale, that point should have been presented at that time. The including of the proceeds of resale in the allowance to the defendant, and not making the resale a bar to the action, was an adjudication in effect, that the resale was not a bar to the action, but cause for mitigation of damages only. Such adjudi cation seems also to be correct.

The motion to amend the pleadings is denied with $10 costs.

SUPREME COURT.

DYKERS, ALSTYNE & Co. agt. W. S. WOODWARD & MARY HALLAM.

The Code (§ 135) provides for the service of a summons on a non-resident defendant by an order and publication six weeks; and, "when the publication is ordered, *personal service* of a copy of the summons and complaint out of the state, is equivalent to publication." And § 137 declares that this species of service (by publication) "shall be deemed complete, at the expiration of the time prescribed by the order for publication."

Held, that the *twenty days* to answer, begins to run *from the day of the personal service*, out of the state.

An admission of the facts constituting fraud, must prevail over a mere unexplained denial of fraudulent intention.

New York Special Term, December 1852. On the fifth of October last, the plaintiffs sold to the defendant Woodward one hundred shares of the stock of the Cumberland Coal and Iron Company, for $6,750; and, on the same day, made a regular transfer to him on the books of the company. Woodward gave,

in payment of the stock, his check for the amount on a bank in New York, which, on presentation, was refused payment. It now appears that he had no funds in the bank at the time, and has had none since. The plaintiffs accordingly charge that the stock was obtained from them by fraud; and they further allege that to effectuate his purpose he immediately transferred it to the other defendant, Mary Hallam, who resides in Connecticut, without receiving any valuable consideration. They ask for a judgment directing the stock to be returned to them, with damages and costs; that in the meantime an injunction may issue, &c. Woodward, in his answer, admits the truth of the above statement, except as to the consideration of his transfer to Mrs. Hallam, and as to his intention in giving the check. He says the former was for the full value received by him from her, and the latter was not fraudulent.

FRANCIS H. DYKERS, *for Plaintiffs.*
HENRY D. LAPAUGH, *for Defendant Woodward.*

ROOSEVELT, Justice.—An admission of the facts constituting fraud, must prevail over a mere unexplained denial of fraudulent intention. The concealed mental purposes of a party can not rebut the legal inferences necessarily arising from his acts. It is the act, not the secret intent which constitutes the fraud. That act, in the present case was the obtaining of the plaintiff's property by a false check, the same in effect as a forged one. As between Woodward, therefore, and the plaintiffs, the sale was void; still, if Mrs. Hallam was a *bona fide* purchaser, without notice, and if she actually parted with her money, on the strength of the transfer, she is entitled to be protected. On this question Woodward's answer can not be used in evidence in her favor. She must aver and prove her own case. Instead of doing so, she has—if the plaintiffs' views of the practice be correct—suffered a default and thereby allowed the complaint, in effect, to be taken as confessed. Being a non-resident the summons, as against her, was ordered to be served by publication. But before the prescribed six weeks had expired, the summons and complaint were served personally in Connecticut. More than twenty days have elapsed since that service, but not since the

expiration of the six weeks. The Code says (§ 143) the answer "must be served within twenty days after the service of the copy of the complaint;" or (§ 128) within twenty days after service of the summons; and that if the defendant (§ 146) fail to answer within the prescribed twenty days, the plaintiff may apply for judgment. Has the defendant Hallam then failed to answer? or in other words, when is she deemed to have been served? Service is either within or without the state; in the former case it must be personal, in the latter it may be either personal or by publication (§ 99, 127, 134, 135). Section 135 provides that where a defendant can not be found within the state, the plaintiff may obtain an order, directing "that the service be made by the publication of a summons," not less than once a week for six weeks; and section 137 declares that this species of service "shall be deemed complete at the expiration of the time prescribed by the order for publication." When, therefore, the Code says that "personal service of a copy of the summons and complaint out of the state is equivalent to publication," it means equivalent to complete service, so as to make the twenty day limitation of the period to answer commence running from the day of such service. The six successive weekly insertions of the advertisement are not with the view of giving time to a distant party to answer, but to increase the chances of his getting notice of the suit. Two or three insertions, the law presumes, might be overlooked. It requires at least six at intervals of a week each, to raise a legal presumption of notice; and even then it is but a presumption. Still for the purpose of rendering the proceedings valid, it is allowed to have the effect of actual notice. Why, then, should not personal service, which is actual notice, have the same effect? The plaintiffs, therefore, are regular in applying for judgment against both the defendants. The defendant Hallam, however, on application and "sufficient cause shown," must, notwithstanding, be allowed to defend. On this point the Code is imperative. Has she, then, showed sufficient cause? She tenders an answer, sworn to by her, and which she proposes, if allowed, to put in; in fact, she says that the transfer was made by Woodward to her "for the full value thereof received from her," cautiously avoiding any

averment as to what the value consisted of, and when it was paid. The statement is perfectly consistent with a case of transfer in payment or security for an antecedent debt. In addition, however, to this ominous suppression, there is a very pregnant obliteration in the document. As originally drawn, it contained an averment that the transfer was made "upon a purchase by her in good faith." This line, although obscured by a very dense cloud of black ink spread over it, can, with some effort, be discerned, nevertheless, by the naked eye. The inference, therefore, is irresistible that the transaction, as between the defendants, was not a *bona fide* purchase, and that no advantage, consequently, can result from it to defeat the relief to which the plaintiffs are entitled against the original fraud. The conclusion is that whether the answer be received or rejected, there must be judgment for the plaintiffs.

SUPREME COURT.

NOXON agt. BENTLEY.

In a suit upon a guaranty of *payment* of a note or bill of exchange, the neglect of the plaintiff to collect from the maker is no defence.

If the complaint sets forth no good cause of action, the defendant is entitled to judgment, though his answer be demurred to and the demurrer sustained.

Where no valid cause of action is alleged, it is fatal in every stage of the action in which the question can properly arise.

A general demurrer for that ground is authorized by the Code (*see Hinds agt. Tweddle and Darlington, ante p.* 278; *and see the cases on both sides of this question, collected in Purdy agt. Carpenter*, 6 *How. Pr. R.* 361).

It seems, that a motion in arrest of judgment may still be made, under the Code.

Saratoga Special Term, June 1852. This was a demurrer to an answer. The complaint set out, as three causes of action, guaranties of the payment of three notes. In each count, it was alleged that the note was transferred by defendant to plaintiff, and that the defendant did, "at the time of the transfer, for a valuable consideration, endorse upon the back of the note and sign with his own proper handwriting and signature, a written

guaranty, guaranteeing the payment of the said note to the plaintiff." The defendant answered, averring, among other things, that the notes were collectable of the makers, and the plaintiff had made no effort whatever to collect them, &c. To this part of the answer, the plaintiff demurred. Defendant also alleged as a further answer that plaintiff gave him a receipt for the notes, and therein agreed that after the plaintiff had collected the notes he would pay the defendant $33·11, after deducting the expenses of collection.

JOHN O. MOTT, *for Plaintiff.*
C. S. GRINNELL, *for Defendant.*

HAND, Justice.—The allegation in relation to the agreement contained in the receipt, does not aid the defendant. He sets that out as a further answer or distinct defence, and does not even say it is part of the same contract by which the notes were transferred.

The neglect of the plaintiff to collect the notes was no defence in a suit upon the guaranty of payment (2 *Comst.* 228; 6 *Barb. R.* 550; 4 *Hill*, 420). This answer is, therefore clearly bad. The plaintiff must, consequently, have judgment, unless the complaint sets forth no cause of action.

If the complaint contains no cause of action against the defendant, he must have judgment. I know it has been doubted whether a general demurrer is now available. But where no valid cause of action is alleged, I have no doubt it is fatal in every stage of the proceeding in which the question can properly arise. If A is sued on a note made by B, it can not be necessary for the latter to state in his demurrer, that it did not appear that he was a party to the note, nor that he had promised to pay it. If the plaintiff should obtain a verdict on such a complaint, judgment no doubt would be arrested. The court could not overlook the defect on a motion in arrest (*Code*, § 176).

Two of these notes were payable to third persons, but the defendant is alleged to have been the owner at the time of the transfer and guaranty. The third is payable to him or bearer. The complaint alleges that the guaranty was for a valuable consideration, but does not state that any consideration was expressed

in the guaranty. Nor does it appear that any consideration was paid for the transfer. The allegation then is that the notes were transferred, and that defendant, for a valuable consideration, made and signed a written guaranty; nothing being said about the instrument of guaranty containing any statement of consideration. The statute requires that the instruments of guaranty shall express the consideration (2 *R. S.* 135, § 2).

Does the fact that the guarantor transfers the note and guarantees its payment for a valuable consideration, bind him, unless the consideration be expressed?

It would seem, as the authorities now stand in this state, that a guaranty by the assignor for a valuable consideration, makes him liable, although the guaranty does not express the consideration (see the cases of Brown vs. Curtis, 2 *Comst.* 225; Durham vs. Manrow, *id.* 533, and Hall vs. Farmer, *id.* 553). If this be so, this complaint is good.

Judgment for plaintiff with leave to amend.

SUPREME COURT.

Townshend agt. The Register of Deeds of New York.

A requisition made upon a register of deeds or county clerk, "to search the records in their respective offices, and certify the title of A— B—, as it appears on and from said records, to certain pieces of land (describing them), and also to search and certify the incumbrances on said pieces of land," is sufficient to compel those officers, upon payment of their legal fees, to perform that duty so far as it concerns the title and incumbrances of A— B—.

If the applicant wishes for a further search he must make out a further requisition, and so on, as far as required. If, however, he wishes to avoid repeated requisitions, he can first examine the records himself (free of charge) and frame a requisition so as to embrace the whole case at once.

Those officers have no authority to charge fees for a search which the party makes himself. The law allows none.

New York Special Term, December 1852. This was a motion calling on the register of deeds in and for the city and county of New York, to show cause why a mandamus should not issue commanding him to make a search. It appeared by the

affidavits, that a request was delivered to the register in the form following: "I require you to search the records in your office, and certify the title of Edward Wigfall, as it appears on and from said records, to the pieces of land hereafter described, and also to search and certify the incumbrances on said pieces of land." Then follows a description of the property. The register objected to make the search on the grounds, among others, that the request was not in the usual form; that to make such a search would entail great labor on the register, and that the request ought to state the name of each party, against whom the search was required, and the period during which such search was to be made

———, *for Plaintiff.*
———, *for Defendant.*

Roosevelt, Justice.—This is an application for a mandamus, against the register of deeds, to compel him to "search the records in his office and certify the title, as there appearing, of one Edward T. Wigfall," to certain lots of land, fully described, in Eighty-fifth and Eighty-eighth streets in the city of New York. Mr. Townshend, who applies for the writ, complains that the Register while forbidding him, Townshend, from searching for himself, unless he paid a fee of five cents for every year searched, refused to comply with a written requisition to do it officially, although tendered full fees for the service. The register objects that the requisition was too general; that it was a very inconvenient departure from the uniform practice of giving the particular names and dates in respect of which the search was to be made; that the records consist of more than one thousand volumes, and that it would be impossible for the force allowed in the office to perform its duties if they were to be called upon to investigate titles, and virtually to discharge the functions of counsel. Titles, too, it is contended, and truly, depend not upon deeds and mortgages only, but upon wills and intestate descents upon deaths, marriages, relationship, alienisms, changes of description and other matters, none of which are recorded in the register's office. How, then, it is asked, can he be expected to "certify the title" of real estate? He may search for a specified

period in respect of a specified piece of property, against specified individuals, for deeds or mortgages from or to them—and even that, in the voluminous condition of the records of this city, is not unfrequently a very tedious and difficult operation—a general search is nearly or quite impracticable. The applicant, however, contends that whatever may be the difficulty, it is nevertheless the duty of the register to perform the service; and he cites the language of the act of 1849 (§ 13) as fully justifying the form of this particular requisition. That act, in prescribing the fees to be thereafter allowed to clerks of counties and registers of cities, declares that they shall charge "for searching and certifying the title of and incumbrance upon real estate, the sum of ten cents for each conveyance and incumbrance certified; provided that such fees shall in no case amount to less than fifty cents, nor more than five dollars." The previous law, as compared in the Revised Statutes of 1830, gave the clerks and registers "five cents for each year, for searching the records in their office," saying nothing about certifying titles. And the change of language, it is contended, was designed not merely to effect a change in the rate of compensation, but in the duties which the officer was to perform. Such a mode of interpretation is not consistent with the rules laid down for determining the effect of statutes or any other written documents. Still it can not be denied that the expressions used in the act of 1840 assume that it was at the time, and was to continue to be the duty of the register "to search and certify titles and incumbrances." What, then, is the fair practical meaning of those expressions? Can A, about buying a certain lot of land from B, who professes to be the owner, go to the register's office and require him to search the title of B to the lot in question, giving merely the name of the alleged owner, and a suitable description of the lot to be conveyed? The register certainly can take the indexes, which the law requires him to make and keep in his office, and search back under the letter B, for grantees of the lot. If he finds no conveyance to B, that, so far as respects the register's duty under the requisition, ends the search, and entitles him to his fifty cents; he certifying that on the records in the office B has no title. If he finds, on the contary, a conveyance to B, he then searches in

the index of grantors and mortgagors from the date of such conveyance to the time of search, and certifies according to the result, whether B, subsequent to his acquiring the title, has conveyed or incumbered the premises. Here, again, he would have earned his additional fees, and his duty under the requisition would have terminated. If the party applying wished for further details, he must make out a further requisition; and so on, from time to time, paying the fees, until he has received all the information the case called for and the records could supply. Has the act of December 14, 1847, changed this view of the subject? That act (§ 40) provides that it shall be the duty of the register to "search the records, and to certify to the correctness of such searches when required to do so, and on the payment, or offer to pay, the fees chargeable by law for such services." It also declares that any refusal or neglect to perform this duty shall be deemed a misdemeanor. This language, it seems to me, so far as it relates to the nature of the duty to be performed by the Register, is substantially the same as that of the previous enactments; or if not, it must be deemed declaratory of their true meaning. What, then, are we to understand by the terms, "searching the records?" Precisely, it seems to me, what has already been explained; that is ascertaining, as in the present case, who conveyed to Wigfall, and when and whether he has conveyed or encumbered his title since. Had the register made such a search and reduced it to writing, certifying to its correctness he would have discharged his duty, he would have searched and certified to the title of Wigfall and the incumbrances thereon. If the applicant then wished to go further, and trace the title of Wigfall's grantor, he would have been compelled to present an additional requisition. A duty, the non-performance of which is made a misdemeanor, is to be interpreted, if not strictly, at least not with latitudinarian comprehensiveness. The interpretation above given, while satisfying, as it appears to me, the words of the law, whether we take the Revised Statutes, the act of 1840, or the act of 1847, seems also to be consonant with reason and convenience. If the applicant wishes to avoid repeated requisitions, he can first examine the records for himself, and with the information thus obtained, in connection with other facts not

there appearing, can frame a requisition sufficiently specific to embrace the whole case at once. But it is said, he is not bound to submit to the double charge. And this brings up the question, can the register charge for a search which the party makes himself? I think he can not. The law is positive (2 *R. S.* 650) that no fee shall be demanded for any service unless actually rendered. And in defining the rate of fees, the old fee bill of 1830 (1 *R. S.* 638, § 30) heads the section with the words "Fees of Clerks, &c., and Register of Deeds, for any of the services hereinafter specified," enumerating among such services, 'searching the records.' The act, too, of 1840 (§ 13), changing the rates, instead of the fees then allowed, gave ten cents "for each conveyance and incumbrance certified by him." And that was to be, and now is, the compensation for searching and certifying the title;" meaning, of course, for a service rendered by the register. In 1847, the legislature changed the office into one with a fixed salary, to be paid out of the city treasury; at the same time making it the register's duty to pay into that depository "all the fees, perquisites and emoluments which he was by law permitted or entitled to take for all official services whatsoever, rendered by him." If, then, the register may now charge for searching the records when done by the party himself, it will follow that he may charge fees without accounting, on the plea that they are for a liberty granted, and not for an official service rendered by him; thus defeating the whole policy of the act, which, in its own language was to provide a fixed salary, "in lieu of all fees, &c., for his compensation for all services whatsoever, which he may perform as such register, or by virtue of his office." The register says it is the practice of the office to allow gentlemen of the bar to search the records, as preliminary to a requisition, without charge. The applicant, however, is not bound (even if allowable) to accept the permission as a favor. Nor has the register, since 1847, any such dispensing power. If the office be entitled to fees where the citizen makes the search, the register must exact them for the benefit of the city. "Gentlemen of the bar," in that respect, stand on the same footing as any other gentlemen, and persons making a search, as preliminary to a requisition, on the same footing as persons searching with a final

or any other view. Either the register is entitled to fees on searching the records by another, or he is not. If he is, he can not waive them; if he is not, exemption is no privilege. The register puts his claim to charge in such cases, on that section of the Revised Statutes which made it his duty to attach indexes to the records, and which at the same time declared that such indexes, "together with such books, should at all proper times be open for the inspection of any person paying therefor the fees allowed by law" (2 *R. S.* 286). There is a seeming inconsistency between this provision and others already cited. The fees allowed by law, as already shown, are not for permission to inspect by the applicant, but for the service, to be rendered by the officer himself, "searching the records." These certainly are not synonymous ideas. If the applicant makes the search, the service, as the law expresses it, is performed by him and not by the register. The Revised Statutes then step in, as already shown, and declare that no fee or compensation by law, shall be demanded or received by any officer or person for any service, unless such service was actually rendered by him. The law consequently allows no fee where the applicant does the service for himself, and the right to inspect, in other words to search the records on paying therefor the fees allowed by law, is a right to inspect or search on paying no fees at all. Were there any doubt, however, on this point under the Revised Statutes, as they stood in 1830, the subsequent acts already referred to, passed in 1840 and 1847, must be considered as entirely removing it. My conclusion is, that the requisition in the present case was sufficiently specific; that a limited answer, covering the record title of Wigfall only, would be a legal compliance with it, and can be readily made; and that if the applicant wishes the title of Wigfall's grantors he must either direct a further search, or make an examination himself, which he may do as a right, without charge, or amend his present requisition so as to render it special and comprehensive enough to cover all points of inquiry within the range of the register's office.

SUPREME COURT.

RUGGLES AND OTHERS agt. FOGG.

Where the plaintiff failed to obtain a more favorable judgment *in amount* than was offered by defendant, under § 385—but on the trial extinguished a set off, of the defendant, which, with the verdict, exceeded the defendant's offer. *Held*, that the plaintiff was entitled to *full costs*.

Monroe Special Term, April 1852. *Costs.* The action was brought to recover a balance of $274·04, claimed to be due from the defendant, upon his promissory note. The defendant, on the third of March 1851, and before answering, pursuant to the 385th section of the Code, served an offer to allow judgment to be taken against him for $230, besides costs. On the same day, he served an answer, denying the allegations in the complaint, and claiming a set off to the amount of $175, for beans sold and delivered to the plaintiffs. The cause was tried on the 12th of April 1852. The defendant's set off was the only matter litigated upon the trial. The jury rendered a verdict in favor of the plaintiffs for $241·67. Each party claimed to be entitled to recover costs from the time of the offer.

G. F. DANFORTH, *for Plaintiffs.*

F. L. DURAND, *for Defendant.*

HARRIS, Justice.—It is conceded that the criterion by which this question is to be determined is, whether the plaintiffs have obtained "a more favorable judgment" than they would have obtained by accepting the offer. If they have, they are entitled to costs *after* the offer, as well as *before*. If not, the defendant is entitled to costs against them. The offer was, that the plaintiffs might take judgment for $230. That sum, with interest from the 3d of March 1851, when the offer was made, to the time of the trial, would exceed the amount of the verdict, and of course, if there were nothing else in the case, the plaintiffs would have failed to recover a more favorable judgment.

But the plaintiffs insist, that had they accepted the offer, the defendant would still have retained his right of action against them for his set off. I do not see why this is not so; and if it be so, then the plaintiffs, having extinguished the defendant's claim, and also recovered a verdict for $241·67, have, in fact, obtained a more favorable judgment than they would, had they accepted the offer. The defendant, probably through inadvertence, omitted to embrace a discharge of his set off in his offer. The plaintiffs are, therefore, entitled to the same costs as though no offer had been made. It is not a fit case to grant costs upon the motion to either party.

SUPREME COURT.

Van Pelt agt, Boyer.

Where defendant was served with summons, and subsequently with an order of arrest, and copy complaint at the same time, but was discharged from the order because attending court as a witness; and no return of the service of the order or complaint having been made, and the defendant not having appeared, a judgment entered by plaintiff for want of an answer twenty days after the service of the summons, but within twenty days from the service of the complaint, *held regular.*

Westchester Special Term, May 1852. *Motion to set aside judgment for irregularity.* The action was commenced on the 14th day of February 1852, by the service of a summons on the defendant personally. On the 26th February, the plaintiff having obtained an order to arrest the defendant and hold him to bail (it being a bailable action), placed the order of arrest and a copy of the complaint in the hands of the sheriff, to be served upon the defendant. The defendant was served with the order of arrest and copy complaint, but was discharged from the order on the ground that he was attending court as a witness at the time of his arrest. No return having been made by the sheriff to the plaintiff of the order of arrest, or service of the copy complaint, and the defendant not having given notice of appearance

in the action, or demanded a copy of the complaint, the plaintiff twenty days after the service of the summons, entered judgment, as for want of an answer. Within twenty days after the service of the *complaint*, and after the plaintiff had entered judgment, the defendant procured an order, which was served on the plaintiff, extending the time to answer twenty days.

The plaintiff refused to vacate the judgment.

R. W. VAN PELT, *Plaintiff in person.*

J. W. TOMPKINS, *for Defendant.*

MORSE, Justice.—I do not think the defendant can be considered as having given notice of appearance under section 130 of the Code, and if he had not, he had not entitled himself either to a copy of the complaint or any further time to answer. The service of a copy of the complaint with the papers accompanying the order of arrest was the act of the plaintiff, and can not be considered as evidence of an intention to appear in the action on the part of the defendant. The judgment was regular, but as the defendant swears to merits, he may be let in on payment of $10 costs of this motion, and the costs of entering and docketing the judgment and issuing and serving the execution.

The plaintiff must be at liberty to proceed upon his judgment and execution until sufficient money to satisfy the same comes into the hands of the sheriff, receiver, or other officer of the court, and then to be subject to the further order of the court.

NOTE.—On appeal to the general term, the decision of the special term was affirmed, with $10 costs, at Poughkeepsie, October 29, 1852.

SUPREME COURT.

Tracy agt. Reynolds and Tucker

One of several defendants who has not been served with a summons or complaint, can not *voluntarily appear* and move to dismiss the complaint under § 274, where his rights are not affected. He must be contented to remain quiet out of court until invited to appear there.

Albany Special Term, 1852. *Motion to dismiss complaint.* A summons and complaint was served on the defendant Reynolds in December 1850. No summons was served on the defendant Tucker, but on the 12th day of December 1850, he voluntarily appeared by his attorneys, and served a notice of appearance and demanded a copy of the complaint. The object of the suit was to reach the surplus moneys arising from the sale of mortgaged premises under a statute foreclosure. The plaintiff, having ascertained that the sale had not been completed, several months before notice of this motion was given, discontinued the suit as against Reynolds and paid his costs. A motion was made on behalf of the defendant Tucker, to dismiss the complaint for unreasonable delay in serving the complaint, with costs.

J. E. Taylor, *for Plaintiff.*

W. L. Learned, *for Defendant Tucker.*

Harris, Justice.—The 274th section of the Code declares that the court may dismiss a complaint with costs, in favor of one or more defendants, in case of unreasonable neglect, on the part of the plaintiff, to serve the summons *on other defendants*, or to proceed in the cause *against the defendants served.* Neither of the things specified has occurred in this case. There has been no omission to serve the summons upon any party other than the defendant who makes this application, nor has there been any omission to proceed against any party who has been served with a summons. There is nothing, therefore, in the provision of the Code referred to, which can sustain this motion.

The counsel who argued in support of the motion, referred to the last clause of the 139th section of the Code, which makes a

voluntary appearance equivalent to personal service of a summons. This provision was not in the Code at the time the defendant appeared in this action. But if it had been, I do not see that it could have given him the right to make himself a defendant against the will of the plaintiff. It was always the case, that by a voluntary appearance the defendant admitted that regular process had been regularly served. His appearance operated upon prior irregularities and omissions by way of estoppel. But it was never the case, in any court, that a party uninvited and unwelcome, could intrude himself upon the court and the plaintiff, unless he had some right to protect which rendered such appearance necessary. Thus, where an injunction had been granted affecting the rights of a party not served with a subpœna, he was allowed to appear, voluntarily, and join in a motion to dissolve the injuntion (Waffle vs. Vanderheyden, 8 *Paige*, 45). So, in the Georgia Lumber Co. vs. Bissell (9 *Paige*, 226), it was held that a defendant, arrested upon a *ne exeat*, might, without waiting for the service of a subpœna, enter his appearance, and demand a copy of the bill.

In this case there is no pretence of any such necessity. The defendant who makes this motion, would have been quite safe to have remained out of court until summoned to appear. If he has incurred expense in retaining counsel, he has done it prematurely, and should not be permitted to charge that expense upon a party who had in no way molested him. The motion must, therefore, be denied with costs.

SUPREME COURT.

Burkhardt agt. Sanford and Farnam Sheriff of Erie.

In an action commenced against a non resident debtor, pursuant to the provisions of section 135 of the Code of Procedure, and a warrant issued according to the provisions of section 227, the court acquires jurisdiction of the action from the time of the allowance of the warrant of attachment.

Where a warrant of attachment is issued in such case, irregularities in service of the summons or in perfecting the judgment will not vitiate the judgment. Such irregularities it seems can only be taken advantage of by motion.

In an action for the recovery of money, so commenced, the plaintiff acquires no lien upon the land of the defendant by filing a notice of the pendency of the action. It is not an action affecting the title to real property within the meaning of section 132 of the Code.

The filing of notice of pendency of the action, is in such a case a nullity.

The creditor's lien upon the property in such case attaches upon the *levy or seizure of the property by virtue of the warrant of attachment*, whether the property attached is real or personal property.

Where land has been sold upon execution and sheriff's certificate given as required by statute, it is proper for the owner of the land sold, who claimed that such sale was illegal or did not confer a title upon the purchaser, to redeem the same from the effect of such sale, and obtain a temporary injunction to prevent the sheriff's paying over the money to the purchaser of such land under the execution, and litigate with such purchaser for the money instead of the land.

But such temporary injunction can not be sustained unless it appears that there will be danger of losing the money, if it should be paid over to the purchaser, on the ground of his insolvency.

The fact of insolvency must be shown positively, and an affidavit setting it forth upon information or belief will not sustain the injunction.

Erie Special Term, January 1852. This is a motion to vacate an injunction order. The facts are substantially as follows, viz:

One Bradley was on the 27th day of April 1850, seized of a tract of land in the town of Tonawanda in the county of Erie. On that day a warrant of attachment was issued against said Bradley by Mr. Justice Parker, in an action against him as a non resident of this state, at the suit of the above named Giles Sanford, a copy of which was served on the plaintiff on the 13th day of May 1850. On the 30th day of April 1850, a notice

of the pendency of such action (which notice described the land above mentioned) was filed in the office of the clerk of the county of Erie.

A judgment was rendered in said action, and judgment roll filed in the office of the clerk of the county of Albany, on the 28th day of August 1850, which roll sets forth, 1st. Summons. 2d. Complaint, demanding judgment for $1379·22, with interest from the 12th day of February 1850, being the amount of two judgments recovered by the defendant Sanford against Bradley, in the Superior Court of the county of Fairfield in the state of Connecticut. 3d. An order bearing date April 27, 1850, made by a justice of this court, directing that the summons be served by publication, also by depositing a copy of complaint and summons in the post office, directed to Bradley, at his place of residence. 4th. Affidavits of mailing such copies. 5th. Affidavit made July 30th, 1850, that no answer had been received. 6th. Affidavits of publication of summons in Commercial Advertiser, a newspaper designated in said order, published in Buffalo, for six weeks sucessively; commencing May 30th, 1850, and the last publication on the 11th of July, 1850. 7th. Affidavit of publication in state paper for six weeks successively, commencing on the 30th day of May 1850, but which did not specify any other day on which said summons was published. 8th. The judgment for $1431·46, and bill of costs for $23·25. That said judgment was docketed in Erie county clerk's office, September 3d, 1850.

On the 31st day of December 1850, the real estate in question was sold by virtue of an execution upon said judgment, by the defendant Farnam, as sheriff of the county of Erie, and bid off by the defendant Sanford, and the certificate of such sale was on that day filed in the office of the clerk of the county of Erie, in which certificate it is stated that said sheriff seized and sold all the right, title and interest which said Bradley had in the said lands on the 30th day of April 1850, for the sum of $1527.

On the 4th day of April 1850, the plaintiff in this action purchased said land of said Bradley, for a good and valuable consideration, without any actual notice of the proceedings against him by or in behalf of Sanford.

On the day said lands were sold by the sheriff, and before such sale the plaintiff read, or caused to be read, in the hearing of the defendant, a notice, setting forth that he had purchased said land of Bradley, before the rendition of said judgment.

The plaintiff sets forth in his complaint the foregoiug facts, and *alleges* various irregularities in obtaining and perfecting the judgment, issuing execution thereon, and then alleges his intention to redeem the land from such sale, and asks for an injunction order, restraining the defendant Farnam from paying over the money which shall be paid to him, to make such redemption, and demands judgment for the money to be paid to the sheriff on such intended redemption, and for damages and costs against the defendant Sanford.

On this complaint, and upon affidavits, an injunction order was granted which the defendants now move to vacate on the following grounds:

1st. The redemption being made, the sale became null and void, and cites Titus vs. Lewis (3 *Barb. S. C. R.* 70; Silliman vs. Wing, 7 *Hill*, 159; American Exchange Bank vs. The Morris Canal and Banking Co., 6 *Hill*, 362; 2 *R. S.* 371, § 47 to 51 inclusive; Wood vs. Colvin, 5 *Hill*, 228; Phyfe vs. Riley, 15 *Wend.* 248; Ex parte Newell, 4 *Hill*, 589).

2d. The payment being voluntary, the money can not be recovered back, and hence no injunction should have been allowed.

3d. It does not appear by the bill that the plaintiff can be injured by allowing the money to be paid to Sanford, as his responsibility is not questioned, except upon information and belief.

4th. The bill shows that the rights of the defendant Sanford, are superior to that of the plaintiff.

LE GRAND MARVIN, *for Plaintiff.*

HAMILTON HARRIS, *for Defendants.*

TAGGART, Justice.—I shall first proceed to consider the last point.

An answer to this point presents the questions: At what time does the lien of an attaching creditor attach, and when does the court acquire jurisdiction of the action against a non resident defendant. If the lien is acquired by the issuing of the warrant

of attachment, or by the filing the notice of the pendency of the action, any subsequent irregularities or omissions, which do not divest the court of jurisdiction, will not defeat the lien acquired by the warrant of attachment, or by the filing notice of the pendency of the action.

By section 139 of the Code, the court is deemed to have acquired jurisdiction and to have control of all subsequent proceedings from the time of the service of the summons in a civil action, or the allowance of a provisional remed

This section is generally deemed to extend the provisions of sections 99 and 137, and provide for a class of cases not within the letter or spirit of those sections.

By the amended Code of 1851, the provisions of this section were still further extended so as to provide for the voluntary appearance of the defendant. Title 7th of the Code enumerates and classifies provisional remedies in civil actions. Chapter 1 treats of arrest and bail; chapter 2, of claim and delivery of personal property; chapter 3, injunction; chapter 4, attachment.

Section 229 provides that the warrant of attachment may be issued whenever it shall appear by affidavit that a cause of action exists against the defendant, specifying the amount of the claim and the grounds thereof; and that the defendant is either a foreign corporation, or not a resident of this state, or has departed therefrom with intent to defraud his creditors, or to avoid the service of summons, or keeps himself concealed therein with the like intent.

The affidavit on which the warrant in this action was allowed, sets forth that the defendant was indebted to the plaintiff in the sum of $1379·22, upon two judgments rendered in the Superior Court of the county of Fairfield in the state of Connecticut, on the second Tuesday of February 1850, which judgments were rendered on two certain promissory notes made by the defendant and held by the plaintiff.

That the judgments were still in force and unsatisfied, and were held and owned by the plaintiff, *and that a summons in this action had been issued to be served on said defendant;* and that the defendant was not a resident of the state, but was a resident of Westport in the county of Fairfied in the state of Connecticut,

and had property in this state. This affidavit states all that is required to authorize the allowance of the warrant, and the warrant of attachment being a provisional remedy, and that being allowed on the 27th day of April 1850, the court then acquired jurisdiction over the action, and any subsequent irregularities would not invalidate the judgment or render the proceedings void; but such irregularities must be taken advantage of by motion, and can not be attacked collaterally. I am confirmed in this view of the subject by the case of Moore's Executors vs. Thayers, executors of McEwen (3 *Code R.* 176). That was a decision at general term on an appeal from an order at special term (see 3 *Code R.* 139). The plaintiff had obtained an attachment under the Code against the property of McEwen, and an order to serve the summons by publication. Before the time prescribed for publication of the summons had expired, McEwen died. A motion was made at special term to substitute McEwen's executors as defendants and denied. On appeal the court say, "the ground upon which this motion was denied at special term was that the summons had not been served at the time of the decease of the defendant. We concur in opinion which was expressed upon the decision of the motion, that, as a general rule, a suit is not commenced, where the service of the summons is by publication, until the expiration of the time for publication prescribed by the Code. But, in addition to the provisions contained in section 137 of the Code, on the commencement of a civil action, it is provided in section 139, that from the time of the allowance of a provisional remedy in a civil action, the court shall be deemed to have acquired jurisdiction, and to have control of all subsequent proceedings. In this case an attachment, which is one of the provisional remedies mentioned in the Code, had been issued against the property of the defendant, McEwen, and his property had been taken under it before his decease. It seems, then, that although there had not been a service of the summons, within the meaning of the Code, still the plaintiff had acquired a provisional lien upon the defendant's property, which would become complete to the amount of his judgment, provided he secured a judgment in the action."

If I am right in this opinion it disposes of all the irregularities

complained of, and entitles the defendant Sanford to the fruits of his judgment, and to the money in controversy, provided his lien, by virtue of the warrant, attached upon the land prior to the sale thereof to the plaintiff.

The next inquiry to be made is, when does the lien of the warrant attach? It is contended on the part of the defendant that it attaches on filing the notice of the pendency of the action.

Section 132 of the Code provides for filing notice of pendency of the action in *actions affecting the title to real property*

The defendant insists that this is an action affecting the title to real property. It is difficult to perceive that this is such an action. The suit is brought for the recovery of a demand against the property of the defendant generally, without any regard to the kind of property, or to any specified property. It was no more an action affecting the title to real property, than an ordinary action to secure a demand against a resident debtor by the service of summons and complaint. In such actions the plaintiff often relies upon the real property of the defendant to satisfy his debt, yet he obtains no lien upon it by the commencement of the action; nor can he acquire any lien by filing notice of its pendency, or in any manner make it an action affecting such title, and until the time of docketing the judgment the right of a *bona fide* purchaser will not be affected. So in this case, the defendant in this action acquired no lien upon the land of Bradley by the filing the notice. Sections 1, 3, 4, 5, 6, of title 1 of chapter 5 of part 2 of the Revised Statutes, provides for issuing warrant of attachment against the property of absconding, concealed and non resident debtors. Sections 1 and 3, authorizes the attaching of the property for the payment of debts, and specifies the class of persons against whose property and upon whose application such attachments may be issued. Sections 4 and 5, provide that the application for the attachment shall be in writing, verified by the affidavit of the creditors or of the person making the same in his behalf, in which shall be specified the sum in which the debtor is indebted, over and above all discounts, to the person in whose behalf such application is made, and the grounds upon which such application is founded.

Section 5 provides that the facts and circumstances to establish

the grounds on which such application is made, shall be verified by the affidavit of two disinterested witnesses.

Section 6 authorizes the issuing of attachments upon such proof being made to the satisfaction of the officer, and directs the publication of notice as thereinafter stated.

By the warrant of attachment the sheriff is commanded to attach and safely keep all the estate, real and personal, of the debtor within his county (except such articles as are by law exempt from execution), with all books of account, vouchers and papers, relating thereto.

Section 7 directs that the sheriff shall immediately attach all the real estate of the debtor and all his personal estate, including money and bank notes (except articles exempt from execution), and shall take into his custody all books of account, vouchers and papers relating to the property, debts, credits and effects of such debtor, together with the evidences of his title to real estate, which he shall safely keep to be disposed of as thereinafter directed.

Section 8 provides for making and returning an inventory of the property seized.

Section 28 provides that whenever any warrant of attachment shall be issued pursuant to the provisions of such article, the officer issuing the same shall thereupon immediately order the notice thereinafter directed to be published.

Section 29 fixes the time in which the notice shall be published.

Sections 30 and 31, specify the contents of the notice to be published in the different cases.

Section 32 provides that "all sales, assignments, transfers, mortgages and conveyances of any part of the estate, real or personal, including things in action, of every such absconding or concealed debtor, made after the first publication of such notice, in payment of or as security for any existing prior debt, or for any other consideration, and all judgments confessed by him after that time, shall be absolutely void as against his creditors."

Section 227 of the Code, which provides for the issuing of attachments against non resident, absconding and concealed debtors, enacts that the plaintiff, at the time of the issuing of the summons, or at any time afterward, may have the property of the

defendant attached as thereinafter provided, *as a security for the satisfaction of such judgment as the plaintiff may recover.*

Section 229 provides that the warrant may be issued whenever it shall appear by affidavits that a cause of action exists against a defendant, specifying the amount of the claim and the nature thereof, and that the defendant is either a foreign corporation or not a resident of this state, &c.

Section 231 provides that the warrant shall be directed to the sheriff, and requires him to attach and safely keep all the property of such defendant, within his county, or so much as may be sufficient to satisfy the plaintiff's demand, together with costs and expenses; the amount of which must be stated in conformity with the complaint.

By section 232, the sheriff is directed to proceed thereon in all respects in the manner required of him by law, in case of attachment against absent debtors, he shall make and return an inventory, shall keep the property seized by him, or the proceeds of such as shall have been sold to answer any judgment which may be obtained in such action, and shall, subject to the direction of the court or judge, collect and receive into his possession all debts, credits and effects of the defendant. The sheriff may also take such legal proceedings, either in his own name or in the name of such defendant as may be necessary for that purpose, and discontinue the same at such times and on such terms as the court or judge may direct.

The provisions of the Code, thus far, harmonize with the provisions of the Revised Statutes; but the Code has no provision for publishing notice, as provided by sections 28, 29, 30 and 31 of the Revised Statutes, and no provision makes void any sale or assignment as in section 32 and 33 and it contains no provision for any notice or other proceeding upon which sections 32 and 33 of the Revised Statutes can operate.

By section 237, sub. 2, of the Code, the sheriff is directed to proceed and sell under the execution issued upon such judgment, so much of the attached property real or personal (except as is provided in subdivision 4 of said section), as may be necessary to satisfy the balance of such judgment, if enough for that purpose shall remain in his county.

But neither this section of the Code, nor any other provisions thereof, states the time when the lien of the judgment creditor attaches, and to ascertain that time he must resort to the Revised Statutes or the principles of the common law.

By the common law, goods were bound by the test of an execution; but by 2d Revised Statutes, 365, § 13, they are bound only from the delivery of the same to the sheriff. And by section 14, the execution first delivered shall have priority over that subsequently delivered, although the latter may be first levied. And by section 15, the right of priority of attachments and executions are placed upon the same basis as of different executions.

If we adopt the principles of these sections and apply them to real estate attached, it will be seen that the warrant of attachment bound the land from the time of its delivery to the sheriff (April 30), and in that case the title of the defendant Sanford to the proceeds of the sale is established. But this section 17, secures the title to any purchaser in good faith, acquired prior to the actual levy of an execution, without notice of such execution being levied. Section 17, however, excludes the word "attach," contained in section 15, and we are still in the dark as to when such lien attaches (see Butler vs. Maynard, 11 *Wendell*, 548; Hotchkiss vs McVickar, 12 *John. R.* 403; Hagerty vs. Wilbur, 16 *John.* 287).

The defendant Sanford acquired no right by the lien of his judgment as that lien did not attach until judgment was docketed (2 *R. S.* 359, § 3). At common law a judgment or recognizance in the nature of a judgment, did not bind the land of the defendant (The People vs. Haskins, 7 *Wend.* 466; 3 *Black. Com.* 418; 2 *Bac. Ab. title Executions*, 685, 686).

In the case of the American Exchange Bank vs. the Morris Canal and Banking Co., and Richards & Selden vs. The Same (6 *Hill*, 363), the plaintiffs in the first entitled cause commenced an action on the 10th March 1840, by attachment against the defendant, a foreign corporation, and the sheriff of New York on the same day attached the banking house and other property of the defendant. The plaintiff obtained a judgment on the 22d May 1841, which was docketed in the Supreme Court on the

same day, and in the clerk's office of the county on the 25th of October 1843.

The plaintiffs in the second case commenced an action by attachment on the 26th June 1840, obtained a judgment on the 12th of May 1841, which was docketed in the Supreme Court on the same day, and in the office of the clerk of the county on the 9th of July 1842.

The banking house levied upon was sold by virtue of an execution upon the first above mentioned judgment, the execution satisfied out of the proceeds of the sale, and the balance of such proceeds paid over to Richards & Selden to apply on their judgment. They subsequently redeemed the property by virtue of a junior judgment and obtained a stay of proceedings, and moved the court for an order directing the sheriff to pay the money to them, on the ground that their judgment was first docketed, and therefore became the first lien upon the banking house. The motion was argued and decided against Richards & Selden on the assumption that their judgment was the first lien, but that by the sale under a junior judgment their lien was not affected. They obtained a reargument and in the opinion given by the court after such reargument, Chief Justice NELSON says (at page 366), "there can be no doubt, I think, that the lien dates from the seizure under the attachment and not from the judgment." The statute, after providing for the commencement of suits against foreign corporations by attachment, directs that the attachment shall be issued to the sheriff of the county in which any property of the corporation may be, "commanding him to attach and safely keep all the estate, real and personal, of such corporation" (2 *R. S.* 375, § 15, 16, 2d *ed.*).

The attachment is to be executed in the manner provided by law in case of attachment against absent debtors; and the sheriff is required to make and return an inventory and keep the property seized by him, or the proceeds of such as shall have been sold, *to answer any judgment which may be obtained in such suit* (*id.* § 21). The next section provides for an immediate sale of perishable articles and of certain other property which is specified; such as vessels, &c. After which it is declared that if judgment be rendered for the plaintiff and an execution issued

thereon, the sheriff shall pay over to such plaintiff the proceeds of all sales of perishable property and of any vessel, &c.; or so much thereof as may be necessary to satisfy such execution. And if any balance remain due he shall sell under such execution, so much of the property of such corporation remaining in his hands as may be necessary to satisfy such balance" (*id.* § 24).

"It is apparent from these several premises that the property attached, both real and personal, is to be held under the attachment by the officer from the time of the seizure until the rendition of the judgment, in order that it may be applied in satisfaction of the debt, and that the right thus to apply the property relates back to the seizure. The proceeding to judgment is a mode of liquidating the demand of the attaching creditor, with a view to such application, instead of appointing trustees for that purpose, as in case of absent or absconding debtors."

The sections of the statutes cited by the learned justice are analagous to section 227 of the Code, by which the plaintiff "*may have the property attached as a security for the satisfaction of such judgment as the plaintiff may recover,*" and to section 232, which provides that the sheriff "*shall make and return an inventory, shall keep the property seized by him, or the proceeds of such as shall have been sold, to answer any judgment which may be obtained in such action.*"

I think it unnecessary to proceed farther in this discussion. I can have no doubt that the lien of the attachment dates from the seizure and from that only. The time the levy was made in this case was most probably on the 13th of May. Neither of the defendants state in their affidavits when the levy was made. The only information the court has on that subject is drawn from the affidavits on the part of the plaintiff and the sheriff's return upon the warrant of attachment. The affidavits state that the first information the plaintiff had of the warrant or existence of the action, was on the 13th day of May, when the sheriff or his deputy delivered to him a copy of the warrant and a notice addressed to the plaintiff, that the same was an original attachment in said sheriff's hands for execution, and that all amounts owing by him to Bradley on bond and mortgage, or otherwise, were attached, and that he was required to make all payments to said sheriff.

On the part of the defendants, the return of the sheriff is the only evidence produced of the time the attachment was levied. The return states that the sheriff attached the lands and premises, and made inventory, appraisal and return thereof to the office issuing the warrant, and on receipt of the execution duly advertised and sold the premises on the 21st day of December 1850. Under which said return is an entry as follows: "Rec'd April 30, '50, made inventory and appraisal return 80 acres of land attached." But neither the affidavit or return, or any other paper on the part of defendants contains any statements of the time the land was attached and inventory made. The question then, as to the absolute rights of parties, will depend upon whether the attachment was served before or after the delivery of the deed.

The affidavit of Harris discloses the fact that the deed was acknowledged by Bradley's wife on the 10th of May, and the execution thereof was proved by Le Grand Marvin on the 13th day of May and that it was not proved according to the statute; but the affidavit on the part of the plaintiff entirely disposes of this point.

If I am correct in the conclusions I have arrived at, the question of priority of the attachment and deed are fairly open for litigation, and the rights of the parties must depend upon that question, unless it shall be found that the plaintiff has lost his right to the money by voluntarily paying it for the purpose of redeeming the land.

I am inclined to think it was proper for the plaintiff to redeem the land from the effect of the sale, and obtain an injunction to prevent the sheriff from paying over the money to the defendant Sanford. He was not bound to have the title to his land pass from him under the sheriff's deed and defend the action brought to recover possession. The risk was greater than he was bound to run, and he had a perfect right to redeem and litigate for the money instead of the land. This land, at the lowest estimate, was worth double the amount of the judgment, and it was a matter of duty for him to secure beyond a contingency his interest in the land beyond the amount for which it had been sold. I am aware that the case of Silliman vs Wing (7 *Hill*, 159),

seems to hold a differnt doctrine but the intimation made by the learned justice who gave the opinion in that case was unnecessary, as he put the decision on entirely different grounds. The case *Ex parte* Newell (4 *Hill*, 589), was a case of redemption and injunction, but no decision or intimation was given as to its being a voluntary payment.

But there is one objection to sustaining the injunction in this case, which I can not surmount. The plaintiff has not shown that it will injure him to have the money paid to the defendant Sanford by the sheriff. He has attempted to show that Sanford is in doubtful circumstances, but all his allegations are upon information and belief, which are not sufficient to authorize the issuing of an injunction, or to sustain one if issued, if he had made a case entitling him to an injunction, still he could not retain it against the affidavits on the part of defendant.

The order for injunction must, therefore, be vacated, with ten dollars costs of motion.

SUPREME COURT.

White agt. The Hudson River Insurance Company.

Though a policy of insurance must state correctly *what* is insured (the subject matter), it is not necessary that the *particular interest in the property, or the reason why*, the party insures should also be expressed.

Where the plaintiff insured "$1500 on his brick building in Washington street, Brooklyn, and $1500 on his engine and boilers therein contained;" and it appeared that before the insurance, one Gilbert owned the property in his own right, and assigned it to the plaintiff in trust to sell and pay the creditors of Gilbert, and the plaintiff was one of such creditors, *Held*, on demurrer, that the beneficial interest of the plaintiff covered the whole insurance, and entitled him to recover.

New York Special Term, December 1852. *On demurrer.*

Mitchell, Justice.—The complaint alleges that the defendants on 27th February 1851, insured the plaintiff against loss by fire to the amount of $3000· viz., $1500 on his brick building in

Washington street, Brooklyn, and $1500 on his engine and boilers therein contained, and shows that the building and machinery thus insured were destroyed by fire during the continuance of the policy. By the third condition of the policy, "property held in trust or on commission must be insured as such, otherwise the policy will not cover such property; and in case of loss the names of the respective owners shall be set forth in the preliminary proofs of such loss, together with their respective interests therein."

The complaint alleges that the plaintiff was the owner of the building and of the boilers and engines.

The answer alleges that the plaintiff was not the owner of the property in his own right; that before the insurance one Gilbert owned it in his own right and assigned it to the plaintiff in trust, to sell and pay creditors of Gilbert. The plaintiff replies that on the execution of the trust deed the whole property was delivered into his actual possession, and that he was one of the creditors to be paid, and that the amount to be paid to him under the trust deed exceeded $3000.

The first question is, can the plaintiff under this policy recover the amount insured on account of the interest he had in the property as a creditor, to be paid out of it?

The questions whether it was material for the plaintiff to disclose this peculiar interest to the defendants, and whether the omission to disclose it would be deemed a fraudulent concealment, and whether that interest would be insured at a higher premium than the interest of an owner in fee, do not arise on this demurrer. There is no allegation as to any representation or concealment occurring at the time of the insurance, and the materiality of the concealment would be a matter of fact for a jury to pass upon (Tyler vs. Ætna Fire Ins. Co. 12 *Wend.* 515). But the policy describes the property as the plaintiff's; that is, as "his building" and "his engine and boilers."

In the U. S. Court where the insured had title to the property as to one third in fee, and as to the other two thirds as mortgagee, but the title as to one moiety was under a contract not complied with; and in their *offer* for insurance the property was described as "belonging to them," and in the policy as "theirs,"

the Supreme Court held that the insured had an insurable interest in the property (2 *Peters*, 46), but that the court below erred in instructing the jury that the interest of the insured in the property (2 *Peters*, 57) was such as was described in the *offer* and in the policy. The Supreme Court refer both to the offer and the policy, but they state (p. 48) that "the *material* inquiry is does the *offer* for insurance state truly the interest of the assured in the property to be insured;" and that court then proceeds to argue that point alone, and takes no notice in its opinion of the description in the policy (p. 50), and concludes, that "this court is of opinion that a precarious title, depending for its continuance on events which might or might not happen, is not such a title as is described in the offer for insurance, construing the words of that offer as they are fairly to be understood," and that the court had "in *this* respect misdirected the jury."

The other point as to the description *in the policy* was not *particularly* noticed by the court, but they in their order disapproved of the instruction to the jury by the court below, without distinguishing between the offer and the policy. This may have been merely to negative the instruction in the words in which it was given. This case came under the consideration of our own Supreme Court in Tyler vs. Ætna Fire Insurance Co in 12 *Wend.* 507–512; and it was there held that it was a question for the jury whether the nature of the interest was material to the risk (p. 515), but that generally "it can not be so material as to justify a conclusion that it would have varied the premium paid" (p. 513), and that it had been held in Massachusetts and in this state "as an established principle of the law of insurance, that a *bona fide equitable interest*, of which the legal title is in another, may be insured under the *general* name of *property*, or by a description of the thing insured, unless there be a false affirmation or representation, or a concealment *after* inquiry of the true state of the property; and that the applicant *need not* represent the *particular* interest he has at the time, unless inquired of by the company" (p. 512); and in that particular case the court held, as they had held before, "that the plaintiff had an insurable interest in the property and was not bound to disclose the nature or *extent of his* interest in

the application unless particularly inquired of by the company; and *that he had a right to insure as general owner.*"

The application of the plaintiff described the property as "*my* house," and the policy described it as "*his* two story frame dwelling house" (p. 508).

The plaintiff had only a contract for the purchase of the land, which he had not fully complied with (p. 508, 513), he therefore had only a right to the lands to be enforced in equity, or an equitable interest in them. The court in this case refer to a variety of cases, some of which it may be proper to state particularly.

In Oliver vs. Greene (3 *Mass. R.* 133), the plaintiff owned half of a schooner and hired the other half from the other owner under an agreement to insure the vessel for $3000, and to pay the other owner $1800 if the vessel should be lost. The policy insured the plaintiff on "the schooner Hiram," and it was held that he could recover for the whole value of the schooner, although it had been argued by the defendant (p. 136), that when a special interest was insured it must be specially described, and freights, profits and respondentia bonds, were quoted as instances.

In Stetson vs. Massachusetts Mutual Fire Ins. Co. (4 *Mass.* 330), the plaintiff after insuring his house conveyed it to another, reserving to himself a term for seven years, and the grantee immediately mortgaged it back to him, and executed a lease to him; it was held that his interest in the property was not so aliened as to prevent his recovery on the policy.

In Lawrence vs. Van Horne (1 *Caines R.* 276), the plaintiffs being owners of one third of the cargo of a vessel, effected an insurance on the cargo without disclosing their limited interest and though intending to insure only their own one third, and they were allowed to recover.

In 2 *Caines' Cases in Error*, 110 (Smith vs. Williams), reversing the decision in 2 *Caines R.* 19, it was decided that the owner of a ship covered by a bottomry bond to an amount beyond her value, had not an insurable interest. The reasons for this decision, if it is still to be deemed authority, are well stated by the counsel for the plaintiff in error (p. 111), and which were substantially adopted by the court, viz., that a bottomry bond is

a species of insurance; (this decided in February 1805; but see 1 *John. Rep.* 385, decided in 1806, and 5 *B. & P.*, 295, in 1806; although those cases do not show that the bottomry was for the full value); in the former the money is advanced before the loss, in the latter after. In *either* case the original owner is, in case of accident (a total loss), equally secure, as the money is not, like a mortgage, to be returned; consequently he can not have an interest, excepting that which remains beyond the extent of what he borrows, and that he should not be permitted, therefore, to insure for more than that excess; that a contrary doctrine would *tolerate double insurance* (and *recoveries*) and open a wide door to fraud. That case does not show how a special interest is to be described in the policy, but it proceeds on the supposition that it need not be specified in the policy; and it helps to show why one kind of special interest must be specified in the policy, viz., a bottomry interest; it is because that is itself in the nature of an insurance. Our law has, as usual, followed the English law, which was founded on the 19 *Geo.* 2, *ch.* 37, to prevent wager policies, and which forbid reassurances except in certain cases, and required that even in those cases it should be *expressed in the policy* to be a *reassurance* (see 1 *Burr.* 492–3, Gordon vs. London Ass. Co.): so in the somewhat similar cases of bottomry and respondentia bonds, from analogy apparently, these special interests must also be stated in the policy (see also, although not authority, the remarks of Mr. Emmett in 11 *J. R.* 309, Murray vs. Col. Ins. Co. to the same effect). The holder, therefore, of a bottomry or respondentia bond, and one who desires a reassurance, must, when they obtain an insurance, specify the nature of their interest. In three other cases also, must the nature of the interest be stated, viz: in a case of insurance on freights, or on profits, or on commissions. Profits must be specified, because in an insurance on goods, the insurer generally takes no risk of the rise or fall in the value of the goods, but is merely to indemnify the owner according to their cost or value at the place of exportation; if, therefore, the profits are to be insured, that can only arise out of a special contract, differing from the ordinary contract of insurance, and therefore, that special contract must be stated. It was not without consider-

able struggle that profits were allowed to be insured at all (see Barclay vs. Cousins, 2 *East*, 544, and Eyre vs. Glover, 16 *id.* 218)

The commissions and privileges of a captain of a vessel for a like reason should be specifically named in the policy, and are then insurable (King vs. Glover, 5 *B. & P.* 206). The same principle applies to freight. It would not be included in an insurance on the ship, or on the cargo; and, therefore, when it is intended to be covered by the policy it must be specially named, and then it may be recovered by the owner of the vessel, even on his own goods carried in his own vessel (Flint vs. Flemyng, 1 *Barn. & Ad.* 49). This shows how liberally the terms used in a policy are interpreted, as they should be, in instruments drawn, with the exception of the printed form, in the fewest words and without the aid of advice; they are therefore called contracts of *uberrima fides*, as the greatest confidence is reposed by each in the fulfillment of the contract by the others, with the utmost good faith, rather than in the words that may be used.

So where the plaintiffs were common carriers by water, and were insured *upon goods* carried by canal navigation in boats, and upon the body and tackle of the boats, they were allowed to recover under that description, for goods of others carried by them (3 *Barn. & Ad.* 478, Crowley vs. Cohen). The different members of the court said, "although the *subject matter* of the insurance must be properly described, the *nature of the interest* may in general be left at large" (p. 485). It is not necessary that the interest of the plaintiff should be more specially described," "The particular nature of the interest is a matter which only bears on the amount of damages, it is *never* specially set out in the policy." "It is only necessary in such a policy to state accurately the subject matter insured, not the particular interest which the assured has in it."

The rule is thus laid down by some of the judges that the nature of the interest need not ever be stated in the policy, and that proposition may be sustained, if freight, profits, commissions, the right of one effecting a reassurance, or holding a bottomry or respondentia bond be considered as the subject matter insured, as the first three may be.

In Carruthers vs. Shelden (6 *Taunt.* 14), the plaintiffs had

effected an insurance on coffee for C. & Co.; their firm was interested in seven-sixteenths of the property, and it was held that they might recover not only for those shares, but to the amount also of all the advances which they had made for the other owners, yet none of those interests were stated in the policy.

In Kinney vs. Van Horne (1 *J. R.* 385), the insurance was on a sloop; the plaintiff had contracted to buy it, and had paid part only of the purchase money, but had not received the title, and was in possession; he was allowed to recover.

In Murray vs. Col. Ins. Co. (11 *Johns. R.* 302), the plaintiffs obtained insurance for themselves, on all goods on board the Rolla; they had purchased the whole cargo, under an agreement that Lyman was to be interested one third in it; although they were not allowed to recover for that one third, yet they were allowed to recover for their two thirds, although the limited nature of their interest did not appear in the policy. So in the same case, the plaintiffs owned only one half the ship, but effected an insurance on the whole; and it was contended that they were not entitled, under the pleadings, to recover for any part (p. 312); but the court held they could recover for the half, and for that only, although the policy was a valued one. The case of Rising vs. Burnett, was there referred to and approved; in it the plaintiff was one of four part owners of a ship, and each insured the freight, without mentioning that it was only a share of the freight that he was interested in; and it was contended for the defendant that the plaintiff should have stated his interest according to the truth and not in that general form; but he was allowed to recover for his one fourth (p. 313).

In 1 *B. & P.* 315 (Wolfe agt. Horncastle), the plaintiffs having advanced £300 in expectation that bills of lading for the goods to be shipped would be sent to them, were held entitled to recover to that amount in a policy on the goods for themselves and others, and which did not show their peculiar interest.

In 1 *Hall's Sup. C. Rep.* 84 (De Forest vs. Fulton Fire Ins. Co. approved in 12 *Wend.* 507 &c.), an insurance on goods, "as well the property of the assured, as held by them in trust, or on commission," was held to cover not only the interest of the assured, but the whole value of the property.

In 9 *Wend.* 409 (Traders' Ins. Co. vs. Robert), SAVAGE, Ch. J. says, "A mortgagor and mortgagee may *each* insure the same building, and it seems their particular interest need not be described in the policy; it may be described *as the property* of the insured; a mortgagor or mortgagee need not disclose his qualified or particular interest—but a bottomry interest must be insured *eo nomine.*"

These cases seem clearly to establish the principle that the nature of the interest need not be specified in the policy, except in cases of reassurance and insurance by the holder of a bottomry or respondentia bond, and insurance on freight, profits, and commissions; and even these cases will not be exceptions to the rule, if they may be regarded as the subject matter insured, rather than as the interest of the party. The rule is thus stated in *Smith's Mercantile Law* (p. 208), "although the *subject matter* of insurance must be properly described, the nature of the interest may be, generally speaking, left at large; in other words, though a policy must state correctly *what* is insured, it is not necessary that the *reason why* the party insures, should also be expressed."

It can hardly be questioned that the plaintiff, by virtue of his beneficial interest in the property, had an insurable interest. It is not essential to an insurable interest that one should have a *property* in the thing insured, or an *estate* legal or equitable in it; the term insurable interest, is used and is more extensive than "property or estate in a thing." In the strongly litigated case of Lucena vs. Crawford (5 *B. & P.* 270), this was admitted by the judges, who agreed in the final decision of the cause, as well as enforced by the judges in the minority. LAWRENCE, J., one of the majority, says: "The contract of marine insurance may extend to protect every kind of interest that may subsist in, or be *dependent upon* things exposed to the dangers, to which maritime adventures are subjected" (p. 303–4). "A man is *interested* in a thing to whom advantage may arise or prejudice happen, from the circumstances which may attend it, and when it importeth that its condition as to safety or other quality should continue, *interest* does not necessarily imply a right to the whole or *a part* of a thing (nor necessarily and exclusively that

which may be the subject of privation) but the having some relation to, or concern in the subject of the insurance, which relation or concern by the happening of the perils insured against, may be so affected as to produce a damage, detriment or prejudice to the person insuring; and where a man is so circumstanced with respect to matters exposed to certain risks or dangers, as to have a moral certainty of advantage or benefit, but for those risks or dangers, he may be said to be interested in the safety of the thing.

The *property* of a thing, and the *interest* derivable from it, may be very different; of the first, the price is generally the measure—but by *interest* in a thing, every benefit or advantage arising out of, or *depending* on such thing, may be considered as comprehended." So in Wolfe vs. Horncastle (1 *B. & P.* 323–4), BULLER, J., says, " a debt which *has no reference* to the article insured, and which can not make a lien on it, will not give an insurable interest; but a debt which arises in consequence of the article insured, and which would have given a lien on it, does give an insurable interest;" and he adds, in the case of an intended consignment of goods, " the case is not at all altered by the goods not having arrived."

A mortgagor and mortgagee, trustee and *cestui que* trust, a consignor for the value that remains after paying the consignee, or for his other interest, and the consignee to the extent of his interest, or advances and lien, and a factor with a lien, may all insure and recover, each according to his interest. Here each creditor under the assignment had an interest in both the real and personal property, although under our statute as to trusts, he may have had no *estate*, legal or equitable, in the real estate (1 *R. S.* 729, § 60). But that statute relates only to real estate, and the personal is left as before, so that as to that there remains an equitable estate in favor of the creditor. And even as to the real estate, the statute referred to expressly declares that the beneficiary " may enforce the performance of the trust in equity " (*id.*), and makes absolutely void every sale or conveyance in contravention of the trust (1 *R. S.* 730, § 65). The creditor, therefore, has such an interest in the real estate assigned, that he can compel the sale of it and the application of the proceeds to the payment of his debt, and no act of the trustee will be allowed to

defeat this right. This is an interest at least as strongly impressed upon the land as that of a mortgagee. It is not like the case of a creditor without any specific lien; certain property is subjected to the payment of his debt.

A person insured having two interests in the same property, may recover according to both or either, as if he be part owner of the goods, and has made advances and has a lien on the other shares of them; so if he were owner of one share and mortgagee of another—and if for any reason he could not recover in the one capacity, that would not prevent his recovery in the other. So here, the plaintiff is insured—the policy is broad enough to cover his interest, both as trustee and beneficiary, and if he can not recover as trustee, on account of not being so described, although he may have intended to insure as such, that is not to prevent his recovery as beneficiary.

As the beneficial interest of the plaintiff is enough to cover the whole insurance, he is on that ground entitled to recover in this case, and the demurrer must be overruled with costs. It may be that equity will require the plaintiff to apply the amount to be recovered for the benefit of all as if he had insured as trustee; that question need not now be considered (*see* 16 *W.* 397, *&c.*).

SUPREME COURT.

DRESSEL agt. FRENCH.

In proceedings under the lien law, passed in 1851, applicable only to the counties of Westchester, Ulster and Putnam (*Session Laws of* 1851, *p.* 319), where the lien claimed (or a balance of account due the contractor) is less than $100, the notice, under § 4 of the act, should require the defendant to appear in a "*Justice's Court*" of the town where the building is situated. If the amount of the lien claimed is over $100, the notice should require the defendant to appear in the Supreme Court, at a circuit or special term, when in session in the county, specifying the day and hour.

Where the plaintiff summoned the defendant to appear in the Supreme Court before the *County Clerk* of Ulster, and claimed a balance of account of $53·40, although the original contract was over $100, and entered judgment by default against the defendant. *Held*, that all the plaintiff's proceedings were unauthorized and void.

The phraseology and construction of that act considered.

Albany Special Term, March 1852. *Motion to set aside a judgment.* On the 4th day of February, the plaintiff, by his attorney, served upon the defendant a notice requiring him "to appear in the Supreme Court, *before the clerk of Ulster county*, at his office in Kingston, on the 24th day of February 1852, at 10 o'clock A. M., either in person or by attorney, and submit to an accounting and settlement of the amount due to the said George Dressel, of Rondout, for work, labor and services performed, and materials furnished by him for the defendant, and at his request, for the altering, repairing or constructing of a certain building, situate in the said village of Rondout." A bill of the particulars of the work, labor and services performed, and materials furnished, was annexed to the notice as follows:

"1851, June 18. To 25 days work at $150	$39·75
53 feet plank, 3	1·59
24 lights glass	1·10
" " sash	96
Aug. 1. To work &c., by contract	130·00
	173·40
Cr. By cash	120·00
	$53·40

On the 25th of February, the defendant's default for not appearing, was entered by the clerk of Ulster county, and a writ of inquiry was issued to the sheriff of Ulster, to assess the plaintiff's damages. An inquisition was taken on the 4th of March, by which the damages were assessed at $55·58, and thereupon judgment was perfected for the damages, so assessed, together with $14·25 costs. Execution was issued to the sheriff of Ulster to collect the judgment. The defendant moved to set aside the proceedings as irregular, and for want of jurisdiction.

E. Cooke, *for Plaintiff.*

M. Schoonmaker, *for Defendant.*

Harris, Justice.—The proceedings in question have been had under the lien law, passed in 1851, and applicable only to the counties of Westchester, Ulster and Putnam (*Sess. Laws* 1851,

p. 319). The act is clumsily drawn, and some, I think I may say most, of its provisions are so obscure as to be almost unintelligible; and yet, I perceive that the new lien law for the city of New York, passed in July 1851, is, for the most part, a transcript of this statute (*Sess. Laws* 1851, *p.* 953.) The general object of the law seems to have been, to furnish security by way of lien, to those who perform labor, or furnish materials in buildings, altering or repairing any house or other building, *under a contract with the owner.* It is only where there has been *a contract* with the owner, that the law provides a lien.

There being such a contract between the person who in the act, is denominated as the *contractor*, and the owner of the building, any other person who performs any labor, or furnishes any materials towards the execution of the contract, obtains a lien upon the owner's interest in the premises. For the purpose of bringing these liens to a close, the 4th section of the act provides that the contractor, or any such laborer or person, furnishing materials, may serve a notice on the owner, contractor, laborer or person furnishing materials, requiring the party served with such notice to appear, either in the Supreme Court or a Justice's Court, according to the amount of the lien claimed, and submit to an accounting and settlement in such court. Where the amount of the lien claimed exceeds one hundred dollars, the parties upon whom the notice is served are to appear "in the Supreme Court for the district in the county in which the building is situated." Although the act was passed before the New York lien law, it bears intrinsic evidence of having been framed after the pattern of that act, and, in some instances, the draftsman has incautiously transferred more of the language of the pattern act than was suitable for his purpose. Thus, when the parties, upon whom the notice, authorized by the 4th section, is to be served, are required to appear "in the Supreme Court *for the district* in the county," it is impossible to give any effect or assign any meaning to the words "*for the district.*" A comparison of this section with the corresponding section of the New York act will show, that the one is a close imitation of the other, and this expression "for the district," answers to "the Justice's Court of the judicial district, &c." of the other act. Again, the

notice must require the parties to appear "at a time certain, or some day to be specified in such notice." Though the meaning of this language may be inferred, no one will deny that it is inapt and awkward. But a reference to the corresponding section of the New York act will show, that, by some misfortune, in transcribing or otherwise, the word "*on*," or, as it is in the New York act, "upon," has been changed into the conjunction "*or*," and hence arises all the obscurity. By substituting *on* for *or*, it becomes apparent, that as the notice for which the section provided might require the parties to appear sometimes in a Justice's Court, the legislature intended that the notice should, like the first process in such courts, specify *the hour* as well as *the day* when the parties should appear.

This, then, I understand to be the meaning of the 4th section, so far as it relates to the case in hand. The plaintiff assumes that he was a contractor, and as such had performed work and furnished materials for the defendant's building. For the work done and the materials found, the first section of the act gave him a lien. If others, under him, had performed part of the work, or furnished materials, they, too might have a lien. If the plaintiff would bring the matter to a close, he may, if the amount of the lien, or, in other words, the amount claimed to be due from the owner, whether to the contractor, or others employed by him, exceed one hundred dollars, proceed in the Supreme Court; otherwise, he can only proceed in a Justice's Court of the town. If he proceeds in the Supreme Court, the notice must specify the day, and the hour of the day, when the parties are to appear. It must be at a time when the Circuit Court or a special term of the Supreme Court, shall be in session *in the county*. The notice must require the parties to appear *in the court*, and in *the county*, and a general term would not take cognizance of such a matter. In Smith vs. Maince (1 *Code R. N. S.* 230), when the parties appeared *in court*, at the time specified in the notice, an order was made requiring the contractor to file his complaint, as in an ordinary action, in ten days, and the owner to answer in twenty days.

If I am right in this construction of the act, it follows that the plaintiff has failed in almost every particular, to comply with its

requirements. The amount of "the lien claimed" was less than $100. The notice, therefore, should have required the defendant to appear in a Justice's Court of the town where the building is situated. But even if the Supreme Court had jurisdiction of the matter, there is nothing in the act authorizing the plaintiff to summon the defendant to appear *before the clerk of the county.* Though an officer of the court, he is not the court, any more than the sheriff or a constable. The parties are to appear *in court*, and *there* submit to an accounting and settlement. The defendant has had no day *in court.* Had he appeared before the clerk, according to the exigency of the notice, what could have been done? The clerk could make no order for the joining of an issue. The plaintiff's proceedings were wholly unauthorized and void. They must, therefore, be set aside, with costs.

SUPREME COURT

LAWRENCE AND ANOTHER agt. DAVIS.

Where a demurrer is interposed to the complaint, it becomes necessary for the plaintiff to apply to the court for judgment, and therefore becomes a trial by § 252. The attorney's fees in such case of $12 before trial, $7 after trial, $15 on the trial, and $1 clerk's fees, is properly allowed

New York Special Term, December 1852. This was an action against the defendant as drawer of a bill of exchange; the defendant demurred to the complaint, and the plaintiffs, under section 247 of the Code, applied on a notice of five days at chambers, for judgment for the amount claimed in the complaint, on the ground of the frivolousness of the demurrer, and the application was granted, no one appearing to oppose.

The plaintiffs entered judgment and had their costs adjusted by the clerk on notice, but for some reason the defendant did not attend on the adjustment; the clerk on the adjustment allowed as attorney's fees $12 before trial, $7 after trial, $15 fee on the trial, $1 clerk's fee on trial.

The defendant now by his counsel, Mr. HOLMES, moved on notice of motion and affidavit, excusing his non attendance on the adjustment, for a readjustment of the costs and disbursements, and insisted that the clerk allowed $5 too much on the first item, and that the three last items should be stricken out and disallowed altogether.

The motion was opposed by R. W. TOWNSEND, for plaintiffs, who insisted that by demurring defendant had turned an action, which, before the demurrer was put in, was one where no application to the court was necessary to obtain judgment, into one where such application was necessary, and that, therefore, $12 was the proper charge. That the demurrer, by section 249 of the Code, made an issue of law and that the application for judgment thereon was a trial by section 252 of the Code as amended in 1852.

ROOSEVELT, Justice, before whom the motion was made, adopted the views of the plaintiffs' counsel, and decided that the costs were properly adjusted by the clerk, and allowed all the charges as adjusted, and denied the motion without costs.

SUPREME COURT.

PARK agt. CARNLEY, SHERIFF.

Where the action is local, and the complaint lays the venue out of the proper county. The defendant on showing that fact, is entitled to an order changing the venue to the proper county.

And the plaintiff can not come in and oppose that motion upon the ground of convenience of witnesses. (*The case of Mason agt. Brown*, 6 *How. Pr. R.* 481 *considered as sui generis, and not applicable to ordinary motions of this kind.*)

Brooklyn Special Term, November 1852. The action was brought against the sheriff of New York for an act done by him in virtue of his office. The venue was laid in Dutchess county.

The defendant now moves to change the place of trial to the city of New York. The plaintiff resists the motion on the ground of convenience of witnesses.

—— ——, *for Plaintiff.*
—— ——, *for Defendant.*

Barculo, Justice.—The proper county for the trial of this cause, according to the Code, is the city of New York (§ 124). The plaintiff ought, therefore, to have named that place in his complaint as the place of trial; and not having done so, it would be a matter of course to order that done which ought to have been originally done. But he seems to suppose that the case of Mason agt. Brown (6 *How. Pr. R.* 481), justifies him in opposing this motion on the ground of the convenience of witnesses. I think, however, that he misapprehends the import of that case. There were two motions heard together. In one of them the defendant moved to change the venue to Madison county, stating that he had six material witnesses residing there. In the other, the plaintiff swore to four material witnesses in Albany county. The court, upon a view of the whole facts, decided that the latter county was the proper place of trial. That was a case *sui generis*, and inapplicable to ordinary motions of this character.

In the present case, the defendant shows that the action is local, and that it has been commenced in the wrong county. He does not state where his witnesses are; for he was not required to state any thing upon that subject. It is sufficient for him to show, that the suit ought to have been commenced in New York, to entitle him to this motion. After the parties are put right in this respect, either of them has the privilege, at the proper time, to come in and ask to be heard as to the convenience of witnesses; and if it shall then appear that Dutchess county is the proper place for trial, the cause will be sent there. But on this application I can not consider the plaintiff's affidavits as to witnesses. The defendant has not had an opportunity to meet them by opposing affidavits; and the motion is not in a condition to be heard on that subject. Motion granted with ten dollars costs.

SUPREME COURT.

WHITE AND OTHERS agt. FEATHERSTONHAUGH.

An application to set aside an attachment as improvidently issued, must be founded and depend upon the affidavits upon which the original application was made. Countervailing affidavits can not be used (*Conklin agt. Dutcher*, 5 *Howard*, 386).

Where notice of appearance is served after the time for answering has expired, the plaintiff is not bound to delay entering his judgment for the purpose of giving notice of assessment.

Albany Special Term, December 1851. *Motion to set aside attachment and other proceedings.* The action was commenced by the personal service of a summons and complaint, on the 25th day of July 1851. On the 4th of August following, upon an affidavit of one of the plaintiffs, stating that the defendant was not a resident of this state, an attachment was obtained against the defendant's property. On the 11th of September, the defendant's attorneys served on the plaintiffs' attorneys a notice of appearance and demanded a copy of the complaint. On the same day, after the service of such notice, the plaintiffs' attorney perfected his judgment. The defendant moved to set aside the attachment upon affidavits showing, or tending to show, that at the time it was issued he was in fact a resident of this state. He also moved upon separate papers, and a separate notice to set aside the judgment for irregularity, and also upon an affidavit of merits.

J. M. SETTLE, *for Plaintiffs.*
W. L. LEARNED, *for Defendant.*

HARRIS, Justice.—It is not denied that the affidavit upon which the warrant of attachment was allowed, was sufficient to authorize its allowance. The defendant's counsel relies upon countervailing affidavits, on the part of the defendant. showing, as he insists, that the warrant ought not to have been issued. Morgan vs. Avery (7 *Barb.* 656), is referred to as an authority sus-

taining such practice. But that case has been overruled by this court in general term, in the sixth district (see Conklin agt. Dutcher, 5 *Howard*, 386). It was there held in a well considered opinion, that in case an attachment has been improvidently granted, it can only be avoided by an application to the judge who granted it, to vacate his own order, or, upon appeal to a general term from such order, and that in either case, the application must depend upon the affidavits upon which the original application was founded. This is, undoubtedly, the true rule to be adopted in such cases. It is therefore unnecessary to inquire whether the defendant has made, by his affidavits, such a case as would show that the attachment was improperly granted. It is enough for the purposes of this motion, that the judge had before him an affidavit sufficient to give him jurisdiction of the proceeding. The motion to set aside the attachment must, therefore, be denied with costs.

It is insisted that notice of appearance having been served before judgment was perfected, the defendant was entitled to notice of assessment and that the judgment was irregularly entered without such notice. It is true that the Code, in general terms, declares that "in case the defendant give notice of appearance in the action, he shall be entitled to five days notice of the time and place of assessment." The same provision, substantially, existed before the adoption of the Code (see 2 *R. S.* 357, § 4). And yet, under the former practice, it was well settled that where notice of retainer was not served until after default, it might be disregarded (see Lynds vs. West, 12 *Wend.* 235; see also *Monell's Pr.* 121). I think the plaintiff is not bound, when notice of appearance is served after the time for answering has expired, to delay entering his judgment for the purpose of giving notice of assessment.

The defendant has made an affidavit of merits in the usual form, and states, in particular, that the plaintiffs should have credited $60 upon their account. The affidavit of the plaintiffs' attorney shows that when the suit was commenced, the defendant examined the plaintiffs' account and admitted its correctness, and stated that it ought to have been paid before. There is no excuse for his omission to answer, nor is it pretended that the

defendant ever intended to interpose a defence. Under these circumstances I am satisfied that no injustice will be done by allowing the judgment to stand. This motion, too, is therefore denied with costs.

SUPREME COURT.

Bryan agt. Brennon.

An *order of reference* is not appealable to the general term. The sufficiency of the complaint as to its containing a cause of action is not necessarily determined by an order of reference in the cause.

Dutchess General Term January 1853. *Judges* Barculo, Brown and Strong. This was an appeal from an order of the City Court of Brooklyn. The cause being at issue, had been referred by that court to a referee to hear and determine.

By the Court, Barculo, Justice.—We are unable to discover any authority in the Code for this appeal. It can not be said that the reference involves the merits. It is merely determining the *mode* of trial; and no more involves the merits than an order changing the place of trial, which we have formerly held not to be appealable.

But the defendant contends that the complaint does not state a cause of action, and that the city court has passed otherwise upon that question, in ordering the reference. It is a sufficient answer to that argument to say, that this is not the proper time to raise that objection. If the complaint is bad in that respect, advantage may be taken of it in various stages of the suit, but not on an appeal from an order of reference, otherwise not appealable. The appeal must be dismissed, with $10 costs.

SUPREME COURT.

Bank of Lansingburgh agt. McKie

Can an *attachment*, having been issued upon an affidavit, showing that sufficient grounds exist to warrant it, be vacated, upon a motion founded upon *new affidavits*? *Held* not. Why? Because, the allowance of the warrant of attachment is clearly within the definition of an *order* contained in the 400th section of the Code; and if an order, it may be reviewed upon *appeal* under the *first* subdivision of § 349. (*This agrees with Conklin agt. Dutcher*, 5 *How. Pr. R.* 386; *and is adverse to Morgan agt. Avery*, 7 *Barb.* 656; *see ante p.* 357).

The fact that the *county judge*, who granted the attachment in this case, was brother-in-law of the *president* of the plaintiffs' bank, who was consequently a stockholder, *held*, not to be such an affinity as disqualified him from acting.

A *stockholder* in a bank is not a "*party*" for whose immediate benefit the action is prosecuted or defended.

And this point necessarily decides another, that is, that a stockholder may be a legal *witness* for the bank.

Albany Special Term, December 1852. *Motion to vacate attachment.* On the 25th of September 1852, the plaintiffs made application to the honorable Charles C. Parmelee, county judge of Rensselaer, for an attachment against the property of the defendant, on the ground that he had departed from this state, with intent to defraud his creditors. The application was founded upon an affidavit of the cashier of the plaintiffs, stating, in substance that the defendant was indebted to the plaintiffs in the sum of $15,000, which had become due in August, and for the collection of which an action had been commenced and process personally served on the defendant; that when the debt was contracted, the defendant had represented that he was the owner of certain real estate in the village of Lansingburgh, of the value $10,000, and that he was worth $25,000, over and above his debts and liabilities; that the defendant had, on the 17th day of September, left this state and gone to Cleveland in the state of Ohio; that before he left, and within two weeks, he had borrowed from various banks in Troy, and elsewhere, more than $50,000,

that after reaching Cleveland, he gave out, and pretended that more than $40,000 of his money had been stolen from him; that, besides the plaintiffs' notes, various other notes and acceptances held by other banks and creditors against the defendant had become due and remained unpaid; and that no provision had been made for their payment; that the defendant had within two weeks executed a mortgage upon the property known as Fake's Row, to John S. Fake, to secure $10,000; that since the departure of the defendant, Fake, who had formerly owned the property, had stated publicly that the defendant had within a few days paid to him the purchase money of the property. Upon these facts, and some others stated upon information and belief only, it was alleged that the defendant was insolvent, and had been for the last two months engaged in a deliberate attempt to defraud his creditors, and for this purpose had departed, and still remained absent from the state, and had invented the false and fraudulent statement in respect to the loss of his money.

Upon this affidavit the county judge allowed an attachment, which was issued to the sheriff of Rensselaer, and by virtue of which he seized the property known as *Fake's Row.*

The defendant moved to set aside the attachment upon affidavits. From these affidavits it appears that the president of the plaintiffs' bank, at the time the attachment was issued, was the brother-in-law of the county judge, and was a stockholder in the bank. The defendant also states that he is informed and believes that the county judge is engaged by the plaintiffs in this action as one of their counsel, and has taken quite an active part in advising the plaintiffs about their action, and in prosecuting the same, and in trying to settle it; that he had been employed to go to the county of Washington, where the father of the defendant, who is an endorser upon the notes held by the plaintiffs resides, to see him in relation to the demand, before the attachment was allowed by him.

The defendant states that on the 17th of September he started for Cleveland, on his way to Pittsburgh, where he had made a contract for the purchase of a large quantity of wool—about 250,000 pounds; that he had a large amount of money with him, and, while at Cleveland, he had $48,700 stolen from his room;

that when he left Troy, he expected to be absent *five or six days*, but having lost his money, he was necessarily detained longer in his efforts to recover it, and that he returned to this state on the 27th of September. He states that he had contracted with Fake for the purchase of his property on the 11th of March 1852, for the price of $20,000, which sum he paid to Fake on the 16th of September, in cash, and at the same time received a conveyance; that he at the same time gave Fake a mortgage upon the premises for the sum of $10,000 to secure him for endorsing, and for rents and interest.

It was shown on the part of the plaintiffs, that at the time the defendant left the state, he was indebted to various banks in Troy to the amount of $87,000, and to the plaintiffs in the further sum of $25,000. On the 8th of October, the defendant made an assignment for the benefit of his creditors. The only property contained in his inventory, is "Fake row," a lot of land in Essex county, containing 160 acres and three notes received from Herrington & Warren, upon the sale of his interest in his wool contract, for $15,000.

The other facts in the case, so far as they are material to the questions decided, will be found stated in the opinion.

J. H. Reynolds, *for Plaintiffs.*

N. Hill Jr., *for Defendant.*

Harris, Justice.—The facts stated in the affidavit presented to the county judge, upon the application of the plaintiffs, were undoubtedly sufficient to justify him in issuing the attachment. If, as the plaintiffs allege, the story of the defendant's robbery is a fabrication, there can be no doubt that the defendant left the state with intent to defraud his creditors. Assuming the plaintiff's theory, in respect to the alleged loss of the money to be true, it follows, that the defendant went to Cleveland, the more effectually to consummate the fraud he meditated. The circumstances set forth in the affidavit were, to say the least, well calculated to excite suspicion, and were sufficient, I think, to warrant the judge in finding, as a fact, that the defendant had departed from this state with intent to defraud his creditors. Indeed, it was not denied, upon the argument, that the affidavit, upon which

the attachment was allowed, contained enough, unexplained and uncontradicted, to sustain it.

This being so, a question is presented which, by reason of conflicting decisions, is involved in some difficulty. That question is, whether an attachment having been issued upon an affidavit, showing that sufficient grounds exist to warrant it, a motion may be entertained upon new affidavits to vacate such attachment.

The question first came before the court in Morgan vs. Avery, 7 *Barb.* 656. In that case a motion was made, at a special term, founded upon affidavits, to set aside an attachment, on the ground that it had been improvidently granted. It was held that the motion was properly made—that there was no remedy by appeal from the allowance of the attachment by the judge—that the attachment is process, and, by virtue of its inherent right to control its own process, the court might entertain such a motion. It appears from a note to the report of this case, that, upon appeal to the general term, the decision was affirmed. (See also, St. Arnaut vs. Beixcedon, 3 *Sand. S. C. R.* 703).

Shortly afterwards, the same question came before the court, at a general term, in the sixth district (see Conklin vs. Dutcher, 5 *Howard*, 386). A motion had been made, at a special term, to set aside an attachment; affidavits were produced by the defendant to disprove the facts upon which the attachment had been obtained. The motion having been denied, the defendant appealed to the general term; upon that appeal it was held, that affidavits to controvert the facts upon which the attachment was issued, could not be received. In this decision I am inclined to concur. The argument of Mr. Justice SHANKLAND, in delivering the judgment of the court, seems to me complete and unanswerable. In respect to the order of arrest, and the order of injunction, the legislature has taken care to provide, that the court shall entertain an application to vacate the order upon affidavits, controverting the facts upon which the application was originally founded. The fact that no corresponding provision is made in respect to this other provisional remedy, furnishes strong ground for the inference that it was not intended that such a proceeding should be authorized. The error, into which the

learned judge, who decided the case of Morgan vs. Avery has fallen, seems to lie in the fact that he has assumed that the allowance of the attachment by the judge can not be regarded as an order made by him, and, of course, that there can be no appeal from his decision, regarding it as an order. That this is an error, is shown, I think, most conclusively, in Conklin agt. Dutcher. The allowance of the warrant of attachment is clearly within the definition of an order contained in the 400th section of the Code; and, if an order, it may be reviewed upon appeal, under the *first* subdivision of the 349th section.

I agree with Mr. Justice EDMONDS in Morgan agt. Avery, that the court, by virtue of its right to control its own proceedings, may entertain a motion for the purpose of preventing abuse and oppression, under an attachment, as well as any other process or proceeding. But I am unable to concur with him in the ground upon which this power may be exercised. It is not because the attachment is *process*, but rather because it is a proceeding in court. An order of arrest is a "requisition," or "warrant," commanding the sheriff to seize the person of the defendant. An order of injunction is a mandate from the court, or an officer, requiring the party to refrain from certain acts. An attachment is a requisition upon the sheriff to seize certain property. All are provisional remedies, designed to operate temporarily. Neither is any more the *process* of the court, than either of the others.

If an order, or any other proceeding, be irregular or illegal, a motion may properly be made, at a special term, to set it aside. Thus, in Blake agt. Locy (6 *Howard*, 108), an order had been made by one of the justices of this court, for the examination of an execution debtor. The judgment had in fact been rendered in a County Court. Of course, the justice had no authority to make the order. It was, of itself, a nullity. A motion was properly entertained to set it aside. And so any other order made out of court, and without notice to the adverse party, may be vacated or modified on notice, in the manner in which other motions are made. This practice is authorized by the 324th section of the Code. But that section is found in the chapter which relates to appeals. It is evident from its connection that the

provision relates to the review of the order, and not a rehearing of the application upon new papers.

This, then, I understand to be the practice as prescribed by the Code in cases like that under consideration. The order having been made out of court, and without notice, the adverse party is at liberty to apply to the judge who made the order to vacate or modify it. This application may be founded upon the papers upon which the judge acted when he made the order, or upon new papers. The decision upon this application is final, except in such cases as are within the provisions of the 349th section. In those cases, of course, a review may be had by an appeal to the general term. Or, instead of applying to the judge who made the order, the party affected by it may move at a special term to vacate or modify it. Such motion, being but a review of the decision of one judge by another single judge, can not involve a rehearing of the original application upon new proof. It is limited to the question whether, upon the facts before the judge, he was authorized to make the order. A review upon the merits, can only be had upon appeal, under the 349th section. If the order be not appealable, it is final, unless it can be set aside for irregularity, or for want of jurisdiction in the officer to make it (see Lindsay vs. Sherman, 1 *Code R. n. s.* 25). In that case, the assignee of a judgment creditor had made an affidavit and procured an order for the examination of his debtor. The affidavit omitted to state upon what authority the application was made. As the case stood before the judge who made the order, the application was made by a mere volunteer. A motion was made, at a special term, to set aside the order. Although it was shown, upon that motion, that the party who made the affidavit was, in fact, the assignee of the judgment, the order was set aside. It was improperly granted. The judge had not the necessary facts before him to authorize him to make the order, and upon the motion to vacate, it was too late to supply these facts.

I am of opnion, therefore, that upon this motion, the question is not, whether upon the facts as they now appear, the plaintiffs are entitled to an attachment, but it is whether the judge who allowed the attachment was authorized, upon the facts before

him, to make the order. If it had been the intention of the legislature that after an attachment had been issued, the question whether or not it should continue, might be tried upon a new state of facts, it is to be presumed that such intention would have been declared, as it has been in the case of an order of arrest and an order of injunction (see *Code*, § 204, 205, 225, 226). These provisions were quite unnecessary, if, without any such express authority, the right of a party to an attachment can, after it has been allowed by one judge, be retried before another judge, upon a new state of facts. The question now to be decided is therefore, whether, upon the case made upon the application for the attachment, it was properly issued. The rule which is to govern in the decision of this question, is whether the facts and circumstances stated in the affidavit upon which the application was founded, were sufficient to call upon the judge to exercise his judgment upon the sufficiency of the evidence. If so, his decision, at least upon this motion, is conclusive (see Conklin agt. Dutcher, above cited).

But, whether this motion is to be determined by the case made before the judge, or upon the facts as they now appear, I am not prepared to say that the judge erred in his conclusion that the defendant had left the state with intent to defraud his creditors, or that the attachment now should be set aside. Before the judge, it appeared that after the plaintiffs' debt had become due, and a suit had been brought against him, and when other debts were about maturing, the defendant had borrowed more than $50,000, and had mortgaged his property for nearly or quite its full value, and then left the state, taking with him this large amount of money, and, after reaching Cleveland, pretended that he had there been robbed. Here was certainly evidence enough to call for the decision of the judge upon the question, whether or not the defendant had departed from the state with an intent to defraud his creditors. Nor do I think the voluminous affidavits which have been read upon this motion, have essentially changed the leading features of the case. It still appears that when he left, the defendant was indebted to the banks in Troy and Lansingburh for loans to the amount of $112,000; that only the day before he left, he paid to Mr. Fake $20,000 for the pro-

perty called Fake's Row, and received a deed therefor, and at the same time executed to Fake a mortgage for $10,000, which, upon its face, purports to have been made to secure a part of the purchase money of the premises, and which, since his return, he has sometimes stated was in fact executed for that purpose, alleging that the purchase money was $30,000, although in his affidavit, produced upon this motion, he states that the mortgage was, in fact, given to secure the mortgagee for future endorsements, and for rent and interest. According to the opinion of three assessors of Lansingburgh, the whole value of the property does not exceed the sum of $12,000. It does not appear that when the defendant left the state he had any other tangible property, except a lot of 160 acres in Essex county, the value of which, though not stated, was probably quite inconsiderable. It is true, the defendant himself swears that when at Cleveland, the sum of $48,700 was stolen from his room. Assuming this to be so, it is quite evident from his own account of his affairs, that he was, before this loss, hopelessly insolvent. It is also true, that the defendant shows a sufficient reason for his leaving the state, at the time he did. He had a contract for the purchase of a large quantity of wool, and he alleges that he took the money with him for the purpose of paying for the wool. How much money was required for that purpose, neither the defendant nor Mr. Herrington, to whom he transferred his interest in the contract, has stated. It seems that payments had previously been made on account of the wool to a large amount; for, when the contract was transferred, the defendant received from Herrington the notes of his firm for more than $33,000. But, conceding that the large amount of money which the defendant took with him was necessary for the fulfillment of his wool contract, it is certainly strange, so strange as to be almost incredible, that a man of experience, and accustomed, as the defendant seems to have been, to the transaction of such business, should have thought it worth while to carry with him so large an amount of money, while other modes of transmitting funds were at his command in every respect more convenient, and entirely safe. These are circumstances which, whatever the truth may have been, are calculated to excite the suspicion

that the conduct of the defendant was governed by some other motive than that of performing his contract for the purchase of wool.

The defendant states that he left Troy for the purpose of going to Pittsburg to fulfill his wool contract, and that when he left he did not expect to be absent more than *five or six days*, and yet, it appears that he only arrived at Cleveland on the evening of the *fifth* day after he left Troy. Called upon, as I think he was, by the peculiar circumstances in which he found himself placed, for a full explanation, it would have been more satisfactory if he had stated where he had been, or how he had been detained during those *five days*. I think, too, the defendant should have felt himself called upon to detail more particularly the circumstances under which a theft so unusual was effected. It would have been better if he had stated how much money he had with him, how much he left in his room, and how it was secured; how the thief effected his entrance and how it happened, that at a public house and at such an hour, his room could have been forcibly entered without the detection of the thief. It is not easy to give credit to the defendant's account of his loss, without more explicit and detailed information in respect to the circumstances.

There is also some intrinsic evidence in the case, which, though of itself scarcely deserving notice, yet taken in connection with the circumstances of suspicion with which the transaction seems to be encompassed, has, I admit, had some influence upon my own mind. In the affidavit of the plaintiffs' cashier, read in opposition to this motion, three letters written by the defendant to him, in the latter part of August, are set forth. It appears from these letters that it is the defendant's practice in writing letters to conclude with the words, "yours truly," before subscribing his name. These words appear in two of the letters set forth. In the other he concludes with the words "yours respectfully." It also appears from the defendant's affidavit that about the time he left Cleveland, Mr. McKinstry, the chief of police of that city, received, through the post office, a letter which had been dropped in the office, purporting to have been written by the person who had obtained the money, and

proposing, in substance, to compromise the matter by restoring half the amount. This letter, like two of those written by the defendant to the cashier, is subscribed "yours truly," and signed "48,900." I do not say that this circumstance furnishes very strong evidence against the defendant. It does not; for others use the same mode of address in concluding a letter. And yet it is a little unfortunate for the defendant that such coincidences appear.

Whether, therefore, the question is to be determined upon the facts presented to the county judge, or upon the additional facts which now appear, I am not prepared to say that the attachment ought not to have been issued.

It only remains to consider the question whether the county judge was incompetent to act in the case. If he was, the attachment was illegally issued, and should be set aside. The objection to his competency rests upon two grounds; first, that he was the brother-in-law of the president of the plaintiffs' bank, who was, of course, a stockholder; and, then, that he was, in fact, in the plaintiffs' employ as counsel, and thus disqualified from acting officially.

The statute disqualifies a judge from acting in any case "in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the *parties*" (2 *R. S.* 275, §2). I have no doubt that the term "parties," as here used, should be construed to embrace all persons for whose immediate benefit the action is prosecuted or defended. It is enough to disqualify the judge, if he be related to a party *beneficially* interested (Foot vs. Morgan, 1 *Hill*, 654). But I do not understand that a stockholder in a bank is such a party. He has no certain or immediate interest in the event of the suit. Like the residuary legatee in Weston agt. Hatch (6 *Howard*, 443), he has "a resulting or collateral interest in the event, but he can not take the fruits of the action, or be made responsible in case of defeat. His interest is such as would have disqualified him as a witness under the former practice, but it can not be said that the suit is prosecuted for his immediate benefit (Davies vs. Cram, 4 *Sand. S. C. R.* 355; Washington Bank vs. Palmer, 2 *id.* 686). I understand, too, that the principle of these decisions has recently

been affirmed in the Court of Appeals (*a*). The fact, therefore, that the county judge was a relative of a stockholder in the plaintiff's bank, did not render him incompetent to allow the attachment.

In respect to the other objection that the county judge had acted as counsel for the plaintiffs, I think is fully met by the affidavit of Judge Parmelee himself. He swears that he has never acted as attorney or counsel for the plaintiffs in this suit or any other suit or proceeding between the parties; that though he did, as the friend, and at the request of some of the parties interested, apply to George McKie to confess a judgment, and had endeavored to effect a settlement between the parties, he had not been employed to do so as attorney or counsel, or in any other capacity.

I am of opinion that the county judge had legal authority to entertain the application for an attachment, and that there was no error in its allowance. The motion must, therefore, be denied with costs.

(*a*) The case of the President, &c. of the Montgomery County Bank, agt. Marsh and others, decided by the Court of Appeals at the last December term (1852), is to this identical point. The reporter's note in that case runs as follows: "A stockholder of a bank is a competent witness for the bank, notwithstanding his interest. He is not a *party* to the action, nor a person for whose *immediate* benefit it is prosecuted; within the meaning of section 399 of the Code of Procedure.

SUPREME COURT.

HICKS agt. WALTERMIRE.

An extra allowance or per centage, under the Code (§ 308), can be allowed only on a "*judgment*."

Where the plaintiff obtained a report of referees in his favor, and an allowance of per centage with his costs, and before the entry of judgment the defendant obtained a new trial "on paying to the plaintiff the costs of the reference heretofore had," *Held*, that the defendant was not required to pay the per centage allowed.

Whether a county clerk can adjust or tax interlocutory costs, *Quere*?

Dutchess Special Term, December 1852. The plaintiff obtained a report of referees in his favor, on which he was allowed

a per centage of $31·09. Subsequently the defendant applied for a new trial on the ground of newly discovered evidence, and obtained an order for a new trial on "paying to the plaintiff the costs of the reference heretofore had." The costs were adjusted by the clerk, who allowed, as part of the costs to be paid by the defendant, the per centage aforesaid. The defendant now moves to strike out from the bill of costs such per centage.

WM. ENO, *for Defendant.*

T. C. CAMPBELL, *for Plaintiff.*

BARCULO, Justice.—Without intending to decide that the clerk has any authority to adjust interlocutory costs, I will endeavor to relieve the parties from the embarrassment resulting from the want of a taxing officer to settle their disputes, by expressing an opinion upon the question submitted.

As I understand the provisions of the Code on this subject, the extra allowance can only be obtained on a *judgment.* For although the language of § 308 speaks of cases where a "trial has been had," and the good sense of the provision would seem to make it applicable to all cases where the prevailing party had incurred extra expense by reason of the litigation, still the next section limits the right of per centage to the party who recovers a judgment. By section 309, the basis on which the per centage must be allowed, if in favor of the plaintiff, is the amount of money recovered by the judgment, in an action for the recovery of money; and "if the defendant recover judgment, it shall be upon the amount of money, or the value of the property claimed by the plaintiff," &c.

Now in this case the action is for the recovery of money. No judgment has been recovered; and there is no certainty that the plaintiff ever will recover a judgment. There is, therefore, no basis upon which a per centage can be estimated. It is true an allowance has been applied for, and an order granting it has been made; but that was done, subject to the contingency of being defeated or annulled, by the award of a new trial. It is the common practice at the circuit to make an extra allowance, on the rendition of the verdict; but such order has never been

deemed effectual, if the verdict was afterwards set aside, and a new trial awarded for any cause. I think, therefore, that the defendant is entitled to proceed to a new trial on paying the residue of the bill of costs.

SUPREME COURT.

WESTGATE agt. HANDLIN.

Notice of sale by advertisement under a power given in a mortgage, was given to take place on the 7th of March, which was on Sunday. Personal service of this notice was made on the 23d of February. The sale was postponed to the 15th March, and published three weeks, and personal service thereof made on the mortgagor on the 1st of March, *Held*, a valid sale.

One day included and one excluded in these cases.

Notice of a postponement of a mortgage sale by advertisement need not be served personally.

Essex Special Term, January 1853. *Ejectment for land sold on a mortgage (given by defendant to plaintiff) by advertising.* It appeared by the affidavits, that the notice, dated December 8th, 1851, of a sale on the 7th March (which was Sunday) 1852, was published twelve weeks, and a notice of a postponement of the sale to the 15th of March, and dated on the 23d February 1852, was also published three weeks. On the 3d day of February, the notice was served personally on the defendant, and also on the 1st day of March the same notice and also notice of postponement, were served personally upon the defendant. The plaintiff bid off the premises.

It was objected that the sale was invalid.

A. B. WALDO, *for Plaintiff*

P. BUTLER, *for Defendant.*

HAND, Justice.—The postponement was regular, notwithstanding the day first named for the sale was on Sunday (Sayles vs. Smith, 12 *Wend.* 57; and see 1 *R. S.* 675). The notice to the mortgagor was sufficient. More than fourteen days notice of the sale, as first appointed, was served upon him; and I do not under-

stand the statute to require personal service of a notice of postponement; publication in the newspaper seems sufficient. Beside, here was personal service of notice of the postponement on the first, for the fifteenth, which would have been sufficient, if the service had been necessary (Columbia Turnpike vs. Haywood, 10 *Wend.* 422; Dayton agt. McIntyre, 5 *How. Pr. R.* 117; *Laws of* 1844, *ch.* 346, § 1; Charles vs. Stansbury, 3 *John. R.* 261; 2 *Ch. G. Pr.* 774–5; Lester vs. Garland, 15 *Ves.* 248, *and notes;* Pellew vs. Crawford, 9 *B. & C.* 134; Handy vs. Ryle, *id.* 603; 2 *R. S.* 546; *Laws of* 1844, *ch.* 346; and see Miller vs. Hull, 4 *Denio*, 104). Judgment for plaintiff.

SUPREME COURT.

Graham agt. Van Wyck and others.

Can a married woman, in consideration of one dollar, convey by deed to *her husband* all her *dower right* in the lands of her husband, under the act "for the more effectual protection of the property of married women," passed April 7, 1848, and amended in 1849? *Held*, that although the language of the act admits of such a construction, the legislature could hardly have intended so violent an innovation upon the existing law.

Besides, it would be a new mode "for the more effectual protection of the property of married women." It ought not to be allowed.

Dutchess Special Term, December 1852. This was an action for partition of lands, which resulted in a sale. On moving for a decree certain questions were submitted to the court by

G. G. Reynolds, *for Plaintiff.*

H. M. Nelson, *for Defendants.*

Barculo, Justice.—The rights of the parties depend somewhat upon the effect which is to be given to a deed executed by Caroline Van Wyck on the 4th day of March 1850. By that instrument she, for the consideration of one dollar, granted and released, so far as she could, to her husband, Theodore Van Wyck, all her dower right in and to "all the real estate" owned by

her said husband. That this deed was inoperative at common law, is too plain to require discussion. If it has any vitality it derives it from the act "for the more effectual protection of the property of married women," passed April 7, 1848. By the 3d section, as amended in 1849, it is provided that "any married female may take by inheritance or by gift, grant, devise or bequest, from any person other than her husband, and held to her sole and separate use, and convey and devise real and personal property and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with the like effect as if she were unmarried." This language certainly admits of the construction claimed for it by the defendant. But I am hardly prepared to believe that the legislature could have intended so violent an innovation upon the existing law. If this deed is permitted to stand, this lady will have conveyed to her husband, shortly before his death, all the interests in his property which could enure to her benefit as his widow, without, so far as I can discover, receiving any thing in return. If such is the effect of this statute, it will be found to contain a new mode "for the more effectual protection of the property of married women." I think the safer and more reasonable construction will restrict her right to *convey*, to persons *other than her husband*. This will harmonize with the preceding part of the section, which permits her to take from any person other than her husband, and will preserve, to some extent, that invaluable principle of the common law, by which husband and wife are regarded, during coverture, as one person, incapable of contracting with and conveying lands to each other.. The legal presumption that she was *sub potestate viri*, at this execution of the release, is not repelled or weakened by the fact shat she now, being free, comes into court and repudiates her former act.

The decree of sale must, therefore, make the usual provision for her dower right.

In regard to the infants who have no general guardian, and the lunatic who has no committee, their shares must be paid to the county treasurer of Dutchess county, to be invested and accumulated, until the further order of the court.

SUPREME COURT.

Dauchy and Dauchy agt. Bennett.

Where a judgment creditor has proceeded to sell under his judgment and take a sheriff's deed of premises, and thus secured the title of the mortgagor in a prior outstanding mortgage upon the premises, such purchaser is entitled to pay off and cancel such outstanding mortgage. But he is not entitled to an assignment from the mortgagee or his assignee in such case, as a matter of course. The purchaser in such case is presumed to bid only to the value of the equity of redemption, and the premises in his hands become the primary fund in equity for the payment and satisfaction of such prior mortgage. To entitle a purchaser to an assignment under such circumstances, he must show affirmatively and clearly, that such assignment is necessary to protect such title or fund in his hands.

The rule seems to be otherwise before the sale, while the judgment is but a lien on the premises. The right to an assignment it seems, does not spring directly from the right of redemption, but from the necessity of the assignment to the protection or enforcement of some right in the redeeming party.

Steuben Special Term, Nov. 1852. The plaintiffs purchased the premises in question at sheriff's sale upon executions issued upon several judgments, which were liens subsequent to the incumbrance of the defendant's mortgage, and took a sheriff's deed.

The plaintiffs were the judgment creditors. The defendant proceeded to foreclose his mortgage in equity, and made the plaintiffs parties. The plaintiffs tendered the amount due upon the mortgage and demanded an assignment of the bond and mortgage, which the defendant refused to execute.

This action is brought to compel the defendant to receive the amount due upon the bond and mortgage of the plaintiffs, and assign his bond and mortgage to them.

The defendant demurs to the complaint generally, "that the said complaint does not state facts sufficient to constitute a cause of action."

H. J. King, *for Plaintiffs.*

Washington Barnes, *for Defendant.*

Johnson, Justice.—The plaintiffs have an undoubted right to pay off the mortgage and thus wipe away the incumbrance from

their premises. But their offer of payment is coupled with a demand of the assignment of the bond and mortgage to them. The complaint does not show that the plaintiffs offered or were ready to pay, except upon the condition of the defendant's executing the assignment. Were the plaintiffs entitled, on payment of the amount due, to demand an assignment of the bond and mortgage? I think not. They were the purchasers under their judgments of the mortgagor's equity of redemption merely; and it is well settled, that the purchaser in such case, is presumed to bid to the value of the equity of redemption only, and that the land in his hands becomes thereafter the primary fund for the payment of the prior incumbrance (Matthews vs. Aikin, 1 *Comst.* 595. McKinstry vs. Curtis, 10 *Paige*, 503; Russell vs. Allen, *id.* 249; Cox vs. Wheeler, 7 *id.* 248; Tice vs. Annin, 2 *John. Ch.* 125). An assignment of the bond and mortgage to the plaintiffs would enable them to prosecute the bond and collect the debt out of the mortgagor by judgment and execution, while holding the land as a fund in their hands for the payment of the mortgage debt. It would also enable them to foreclose the mortgage and cut off the right of dower, of the wife of the mortgagor, to which their title under the sheriff's deed is now subject, and which would be preserved by a payment and discharge of the mortgage with the funds in the plaintiffs' hands. In every point of view, therefore, it is inequitable in the plaintiffs to demand an assignment. Indeed, this precise question was so decided by the chancellor in McKinstry vs. Curtis.

No facts are stated in the complaint to show why a satisfaction and discharge of the mortgage would not be quite as beneficial to the plaintiffs as an assignment, so far as the protection of the equity of redemption which they have purchased is concerned. The plaintiffs now hold this land under the sheriff's deed as a primary fund in equity for the payment and satisfaction of the mortgage debt; according to all the cases, and the only ground upon which equity will interfere to compel an assignment must be, I think, that an assignment is necessary in order to afford a complete protection to such fund in the purchaser's hands. The court has no power to compel one person to sell and assign a security or chose in action to another, unless such transfer is

shown clearly to be indispensable to the attainment of complete justice, the protection and preservation of some unquestionable right, or the prevention of some manifest wrong. No such case is made by the complaint. It is not pretended that there are any other liens or claims upon the land which can in any way interfere with the plaintiffs' title when this mortgage is paid off and discharged. It is of no consequence whatever, so far as the right of action here is concerned, that Snell, the mortgagor and judgment debtor is insolvent, and the plaintiffs are unable to collect a large portion of their judgments, as alleged in the complaint. It is the protection of the estate or fund alone, to which the court will look, and not the pecuniary condition of the debtor, or the advantages to be gained by the creditors independent of such protection. This power to compel an assignment, would be a dangerous one indeed, if it could be exercised arbitrarily, or upon any mere suggestion of profit or convenience to the party invoking it.

The plaintiffs' counsel relies upon the decision in the case of Pardee vs. Van Auken (3 *Barb. S. C.* 534), as decisive of the question involved in this case. But that case has, as I conceive, no application to this. In that case it appeared that the mortgagor in the junior mortgage, who held the legal title, had covenanted with his mortgagee to pay off and discharge the prior mortgage. He had failed to do so, and the mortgagee in the prior mortgage was proceeding to foreclose, and the court held that the subsequent mortgagee, on payment of the amount due on the first mortgage, was entitled to an assignment in order to protect his rights completely against the subsequent mortgagor, who still held the legal title, and who might sell and convey the premises at any time after the prior mortgage should be paid off and satisfied. That the assignment was properly decreed in that case, can not be doubted.

But this is not that case. Here the plaintiffs hold the legal title to the land; all the right and title which Snell, the mortgagor, ever had, and they stand in his shoes. He is entirely divested of all right and title by the sale and conveyance of the sheriff, and can do nothing to affect their rights. Before the sale of the premises by these plaintiffs, and perfecting title under

their judgments, their situation was nearly, though not completely analagous to that of the subsequent mortgagee in Pardee vs. Van Auken. They then had a mere lien upon the premises and strictly, as suggested by Mr. Justice GRIDLEY in that case, had they then come to redeem would have redeemed the prior incumbrance and not the premises.

Now, however, it is different; their lien has ripened into a title and the discharge of the incumbrance of the mortgage, is all that is necessary to the perfection and security of that title, so far as we can see from the allegations of the complaint. They now redeem the premises which they hold in fee, from the incumbrance. I am inclined to doubt the dictum of Mr. Justice GRIDLEY, that the right to an assignment springs directly from the general right of redemption. I am of opinion that the right springs rather from the necessity of the assignment to the protection of some right in the person redeeming, and which should always be shown by the complainant. And that it does not necessarily follow that a person has the right to an assignment because he has the right to redeem.

It is sufficient, however, for the purposes of this case to observe, that the decision in McKinstry vs. Curtis, is not overruled or questioned, or even alluded to in Pardee vs. Van Auken, and as the two decisions are not necessarily in conflict, the former must still be regarded as the established rule of equity in this state.

The plaintiffs' counsel insists that a general demurrer is not authorized or allowed under the Code. The demurrer in this case, though in the exact language of the sixth subdivision of § 144 of the Code, is nothing more nor less in fact, than a general demurrer to the whole bill or complaint, for want of equity, which was always allowable in pleadings in equity suits.

However this vexed question may be ultimately settled in regard to demurrers in actions strictly legal in their character, I think it can not be reasonably pretended that the Code has changed the rule in this respect as to pleadings in actions purely equitable in their nature. This being an action purely of equitable cognizance, I think the demurrer is proper in form. I am also of opinion, for the reasons above stated, that it is well taken and must be allowed. Judgment for the defendant upon the demurrer.

SUPREME COURT.

Learned and others agt. Vandenburgh.

Ransom and others agt. The same Defendant.

Adams agt. The same Defendant.

In reference to the lien of attachments.

The mere *return* of the sheriff that he has attached the land, is enough to secure a lien of the creditor. It is not necessary that he should go on to or even see it.

It is different with *personal property*. To render the seizure effectual it must be accompanied by *possession*.

Upon the question whether or not any specific property, real or personal, has been attached, the *inventory* returned by the sheriff must be *conclusive*.

Where several attachments have been served upon the same property, the priority of their respective liens must be determined by the order in which they were delivered to the sheriff.

It seems, that in order to make the lien of an attachment upon real estate effectual as against bona fide purchasers or incumbrancers, it is necessary to file the notice prescribed by § 132 of the Code.

Motion for directions to sheriff of Greene, in respect to the application of the proceeds of certain real estate sold upon execution. On the 10th day of April 1852, attachments were duly obtained by the plaintiffs in the first two actions against the defendant and delivered to the sheriff of Greene. Two other attachments against the same defendant had previously been issued, and were then in the hands of the sheriff. On the 12th day of April, another similar attachment was issued in favor of another creditor. By virtue of these attachments the sheriff seized all the personal property of the defendant, and made and returned an inventory as required by law. In a return endorsed upon the attachments issued in the two causes above entitled, the sheriff states that he had attached all the personal property of the defendant, "*and only personal property.*"

On the 17th of April, another attachment was issued in favor of Mallory & Ingalls, against the same defendant. Upon this latter attachment the sheriff returns that he had attached "all the real and personal property of the defendant."

Judgments were recovered in the above entitled actions, on the 19th of June; in the first for $322·84; in the second for $263·77, and docketed in Greene county on the 21st of June. On that day executions were also issued to the sheriff of Greene. Executions were also issued about the same time upon judgments recovered in the actions in which the prior attachments had been issued. On the 12th of October, the sheriff sold the personal property attached by him. The proceeds were sufficient to satisfy the executions issued upon the judgments recovered in the actions in which the prior attachments had been issued, and a part of the execution in the action first above entitled—the attachment in that action having been delivered to the sheriff a few minutes prior to the delivery of the attachment in the second action.

On the 16th of June, the plaintiff in the action lastly above entitled recovered, by confession, a judgment against the defendant for $620·12. The judgment was docketed and execution was issued to the sheriff of Greene on the same day. No attachment had been issued in this action.

On the 15th of October, the sheriff, by virtue of the executions in his hands, sold the real estate of the defendant, and realized therefrom $375, which sum he now holds, ready to be applied upon the executions according to their legal priority

G. L. Wilson, *for Plaintiffs in 1st and 2d actions.*

J. C. Van Dyck, *for Plaintiff in last action.*

Harris, Justice.—The proceedings upon attachments, under the Code., are the same as those prescribed by previous statutes in respect to attachments against foreign corporations (2 *R. S.* 459, § 15, *et seq.; Sess. Laws*, 1842, *p.* 227). Indeed, the provisions of the Code relating to attachments, are substantially copied from these statutes. One essential difference, however, is, that the attachment against a foreign corporation, issued under the provisions of the Revised Statutes, required the sheriff to attach all the estate, real and personal, of the corporation, while the warrant under the code, as now amended, requires the sheriff to attach all the property of the defendant, *or so much thereof as may be sufficient to satisfy the plaintiff's demand*, &c. In this case, the sheriff, in accordance with this new provision, attached

only the personal property of the defendant by virtue of the attachments issued prior to the 17th of April, believing, as may be supposed, that such personal property would be sufficient to satisfy the judgments which might be recovered in those actions. But when the attachment in favor of Mallory & Ingalls came into his hands, he added to the property already seized, the real estate of the defendant. The property attached having been sold, and the personal property having proved insufficient to satisfy the demands upon which attachments had been issued before the 17th of April, the question arises, what disposition shall be made of the proceeds of the real estate.

The object of the attachment for which the Code provides, is to give the creditor a lien upon property of his debtor sufficient to satisfy his demand, before he recovers judgment; or, as it is expressed in the 327th section of the Code, to provide "a security for the satisfaction of such judgment as the plaintiff may recover." The sheriff upon receiving the attachment is required to proceed immediately to execute it, by attaching the property of the defendant, or at least enough to satisfy the plaintiff's demand, with costs and expenses. For this purpose, he must, with the assistance of two disinterested freeholders, make an inventory of the property seized, with an appraisal of the personal property, and a specification of such articles as are perishable, and within ten days *return* the same to the judge by whom the attachment was issued (*Code*, § 232; 2 *R. S.* 488). For the purpose of securing the lien upon real estate it is only necessary that it should be included in the inventory returned by the sheriff. "It is settled, says SHAW, Ch. J., in Taylor vs. Mixter, (11 *Pick.* 341), that in order to make a valid attachment, the officer is under no necessity to enter upon the land, or see it, or go into its vicinity; nor is it necessary that he should do any act, other than return that he has attached the land." It would be idle to require the sheriff to do any thing more. The title and the right of possession still remains in the debtor—*ad impossibilia aut vana, lex non cogit.* The mere return of the sheriff that he has attached the land is enough to secure a lien for the creditor, to be enforced when he shall obtain judgment.

In respect to personal property, it is otherwise. To render the

seizure effectual, it must be accompanied by possession. The sheriff is bound to see that it is safely kept to satisfy the judgment which the creditor may recover. He must, therefore, not only seize the property, but take it into his custody.

Upon the question whether or not any specific property, real or personal, has been attached, the inventory returned by the sheriff must be conclusive; if *no inventory* be returned, other proof may, perhaps, be resorted to, and when several attachments have been served upon the same property, the priority of their respective liens must be determined, I suppose, by the order in which the attachments were delivered to the sheriff. In order to make the lien of an attachment upon real estate effectual, as against bona fide purchasers or incumbrancers, I think it would be necessary to file the notice prescribed by the 132d section of the Code.

With these principles before us, there is no great difficulty in determining the questions involved in this motion. The sheriff having contented himelf with attaching merely the personal property of the defendant under the attachments issued prior to the 17th of April, it follows that the plaintiffs in those attachments acquired no lien upon the real estate. Whether by omitting to serve the attachments on the real estate of the defendant, the sheriff has rendered himself liable to the plaintiffs who have been prejudiced by such omission, I need not now inquire. No lien having been secured by these attachments, the real estate was left free for the operation of the attachment in favor of Mallory & Ingalls, on whose behalf alone it was attached. Neither of the parties to this application, therefore, as the facts now appear, is entitled to the moneys in the hands of the sheriff. The motion, of course, can not be granted.

SUPREME COURT

SEARS AND OTHERS agt. GEARN AND HOUGHTON.

The *copartnership property* can not be seized on an *attachment* against *one* absconding partner, for a partnership debt (*see Stoutenburgh agt. Vandenburgh, ante p.* 229). This was so under the old statutes (*see* 16 *John.* 102).

Where the *account book* belonging to the copartnership was seized upon an attachment against an absconding partner, it was ordered to be delivered up by the sheriff to the resident partner.

Albany Special Term November 1852. *Motion for an order directing the sheriff of Saratoga to restore to the defendant Houghton, an account book seized under an attachment.* The defendants had been copartners in trade, at Saratoga Springs. On the 27th of October 1852, the copartnership was dissolved. This suit was commenced on the 6th of November, to recover a copartnership debt. An attachment was issued against the defendant *Gearn*, alone, as an absconding or concealed debtor, by virtue of which the sheriff of Saratoga took from the possession of the defendant *Houghton*, without his consent, an *account book*, belonging to the copartnership, and containing uncollected copartnership accounts. The attachment contains a direction to the sheriff to take the property of Gearn, and also the partnership property of the defendants.

F. S. ROOT, *for Plaintiff.*

MERRILL & MCKINDLEY, *for Defendant Houghton.*

HARRIS, Justice.—Gearn having absconded, the plaintiffs were entitled to have his property attached as a security for the satisfaction of such judgment as they might recover against him. But it was only the property of Gearn, and not the copartnership property of his firm, that might thus be seized (Stoutenburgh agt. Vandenburgh, 7 *How. Pr. R.* 229).

In Brewster agt. Honigsburger (2 *Code Rep.* 50) though the report of the case states that the attachment had been levied upon property belonging to the copartnership, the motion was to

set aside the attachment itself, on the ground that an attachment could not issue against two of several copartners who were non residents, when there was another partner who was a resident of the state. The motion was very properly denied. No question was made upon the right of the officer in serving the attachment, to seize copartnership property.

An attachment may be issued against an absconding partner, upon a copartnership debt, for the reason that such debt is, as well the individual debt of each copartner, as the joint debt of the copartnership. The property of the absconding partner may, therefore, be seized to secure the payment of such debt, as well as any other debt for which he is individually liable. But no authority is given to take, under such an attachment, the property of the copartnership. The resident partner has a right to retain this, for the purpose of paying the partnership debts. The attachment will only operate upon the interest of the debtor against whom it is issued, in the surplus which may remain after closing up the partnership accounts.

In the matter of Smith (16 *John.* 102), an attachment had been issued under the provisions of the act for relief against absconding and absent debtors (1 *R. L.* 157), against Smith. The attachment, like that issued in this case, required the sheriff to take, not only the property of Smith, but the property of Soulden & Smith, who were partners in trade. Under the attachment, the sheriff seized the books of account of the copartnership. Upon a motion made for that purpose, the court directed the goods, books, &c. of the partnership which had been seized, to be restored to Soulden, the resident partner. The court said "the sheriff can take the separate property only of the absconding debtor. He can not seize the partnership effects, for the other partner has a right to retain and dispose of them for the payment of the partnership debts." So far as the mode of serving the attachment is concerned, the provisions of the Code are not distinguishable from those of the previous statutes authorizing attachments against absconding and absent debtors. I am of opinion, therefore, that the direction which this attachment contains, requiring the sheriff to seize the partnership property was unauthorized, and that the seizure of the account book of

the partnership was illegal. An order must therefore be entered, requiring the sheriff to restore to the defendant Houghton, the account book seized by him. I think, too, the plaintiffs should be charged with the costs of this motion.

SUPREME COURT.

KING agt. VANDERBILT.

In deciding motions to change the place of trial, courts now look beyond the affidavits of the parties and the advice of their counsel, to the pleadings, and the issues to be tried; and from the whole case, as presented by the affidavits and the pleadings, determine in which county the trial will accommodate the greatest number of witnesses, whose attendance it will be necessary for the parties to secure, in the reasonable exercise of care and prudence in preparing for trial.

It does not follow as a matter of course, that the place of trial will be changed to the county where the greatest number of witnesses are shown to reside. If it appears that in such county the cause, in the ordinary course of things, will not be likely to be reached and tried until after several circuits shall have been held, and that the greatest convenience will not be secured by such change, the motion will still be denied.

In determining such motions the convenience of witnesses is the main consideration, though the dispatch or the oppressive delay of suits are considerations not to be wholly overlooked.

Seneca Circuit, September 1852. Motion to change venue from Cayuga county to the city and county of New York. The defendant swears to twenty-four witnesses in New York, and the plaintiff to eleven in Cayuga county.

GEORGE RATHBUN, *for Plaintiff.*

H. F. CLARK, *for Defendant.*

JOHNSON, Justice.—It appears clearly enough from the pleadings in this cause, as well as from the affidavits of the respective parties, that the only substantial controversy in the action is in regard to the defendant's liability for failing to transport the plaintiff from San Juan del Sur to San Francisco, and the amount of damages the plaintiff has sustained and is entitled to recover in case the defendant is made liable.

The non joinder of other parties, as defendants, alleged in the

answer in abatement of the action, can not be made available to the defendant on the trial. The objection, although taken in the answer, is waived, and loses all its force and pertinence by joining it with an answer upon the merits (Gardiner agt. Clark, 6 *How. Pr. R.* 449).

There is no pretence that the contract, whatever it may have been, was not performed in all respects, except that of carrying the plaintiff from San Juan del Sur to San Francisco, and for this failure the defendant insists that he is not liable to respond in damages.

This and the measure of damages are all the questions upon which either party can need any testimony on the trial. This being so, it is clear that it can not be necessary for the defendant upon the trial to secure the attendance of a great number of witnesses. A very inconsiderable number only of those mentioned in his affidavit, and sworn to be material and necessary, can be so, in the nature of things.

Courts now look beyond the affidavits of the parties, and the advice of their counsel, to the cause of action and the defence, to ascertain what is to be tried, and determine from a view of the whole case as presented by the pleadings and affidavits, whether a change of the place of trial will really accommodate and be most convenient for the greatest number of witnesses, who in the reasonable and proper exercise of care and prudence, in the preparation for trial, will be required to attend the circuit.

All experience has shown that parties and their counsel in their strong anxiety to change or retain the place of trial, are exceedingly prone to imagine and represent, and, indeed, to believe, that a much larger number of witnesses are necessary and material, than are ever called upon to testify upon the trial, or, in fact, subpœnaed to attend the circuit.

So great had formerly become this evil, that in many cases the application might as well have been determined by the census of the respective counties, as by the affidavits of the litigants, so far as the real merits of the question were involved.

It was in view of this state of things, and to secure a more just and proper determination of this class of motions, that rule 45 of the present rules, and 48 of the rules of 1849, were adopted.

The convenience of witnesses whose attendance it is necessary and proper to secure, is the main consideration in determining applications of this kind; but the mere excess of numbers does not always control.

For instance, in a case where the plaintiff has six witnesses in the county where he fixes the place of trial, who are all really material, and the defendant has eight or even ten in the county to which he seeks to remove the trial, and it is apparent that in the county designated by the plaintiff, the cause will be likely in the ordinary course of things, to be reached and tried at the first circuit, and that in the county designated by the defendant there is an equal probability that the trial will be delayed five or six circuits and the plaintiff's witnesses compelled to attend from time to time, the consideration of the greatest convenience would still be strongly in favor of the plaintiff.

The despatch on the one hand, and the oppressive delay on the other, in the determination of controversies, are considerations not to be wholly overlooked upon these motions.

In the present case, however, considering the number of witnesses alone, whose attendance will be necessary upon a trial of the merits of this action, I am wholly unable to see any good reason for changing the place of trial.

I think the numbers of really material witnesses are clearly in favor of the plaintiff. Motion denied.

SUPREME COURT.

TOWNER BY J. T. NEXT FRIEND agt. TOWNER.

If a *feme covert* plaintiff is not an infant, or lunatic, &c., no order for leave to sue by next friend, or for appointment of next friend is necessary.

Essex Special Term, January 1853. M. T. CLOUGH moved for a reference.

R. S. HALE objected, that there had been no appointment of J. T. as next friend, nor service of any papers upon the defendant's attorney for that purpose, which he insisted was irregular.

HAND, Justice.—I do not understand the practice as contended for by the defendant's counsel. If a *feme covert* plaintiff is not an infant, or lunatic, &c., no order for leave to sue by next friend, or for the appointment of next friend, is necessary (1 *Hoff. Pr.* 66). It seems he should be a man of substance; and if he is insolvent, the proceedings may be stayed a reasonable time till security is filed, and the complaint may be dismissed if that is not done (Lawrence vs. Lawrence, 3 *Paige*, 267; Fulton vs. Rosevelt, 1 *id.* 178; Robertson vs. Robertson, 3 *id.* 387; Remnington vs. Alvin, 1 *S. & S.* 264; Barlee vs. Barlee, *id.* 150: Anon. 1 *Atk.* 570; 1 *Dan. Pr.* 144; 3 *Wend.* 424; 3 *Bac. Ab.* 360; Andrew vs. Craddock, 1 *Eq. Ca. Ab.* 72; *S. C. Prec. in Chan.* 376). In case of an infant sole plaintiff, the Revised Statutes required that the next friend should be appointed by the proper officer (2 *R. S.* 445–6). The Code requires a guardian for an infant party, to be appointed by the court or a judge (*Code*, § 115–6). But if of full age, as in this case, I find no precedent of an order appointing a next friend. No one can sue as her next friend without her consent (*Stor. Eq. Pl.* § 61), which is usually evinced by a written consent signed by her (1 *Hoff. Pr.* 66; *App. No.* 11; 2 *Barb. Ch. Pr.* 263, 687). In Remington vs. Alvin, *supra*, it appeared the next friend was the paramour of the plaintiff and insolvent; a person not likely to be appointed by the court. And in Bligh vs. Tredgett (8 *Eng. L. & E. R.* 79), one whom the solicitor had substituted in the place of a deceased *pro. ami*, was made liable for all the costs, though the substitution was without his knowledge, he having never heard of the suit until a motion to dismiss the bill (and see *Mitford*, 28; Randolph vs. Dickerson, 5 *Paige*, 577; Andrews vs. Craddock, *supra*; Greenaway vs. Rotherham, 9 *Sim.* 88; 1 *Dan. Pr.* 14; Smith vs. Myers, 3 *Madd. R.* 474; 1 *Moult. Ch. Pr.* 107; 2 *id.* 490; Anon. 1 *Ves. Jr.* 409, *and notes*). This case might have been decided differently here, as to the liability for costs; but I do not understand any action of the court is necessary to appoint a *pro. ami* in these cases. Nor do I understand that the Code has changed the practice as to the manner of naming or appointing a next friend.

SUPREME COURT.

BUSHNELL agt. BUSHNELL.

Is the writ of *ne exeat* still in operative existence? *Held*, that it must be so considered, in order to accomplish the ends of justice in many cases, where no kind of substitute is given by the Code. It is not abolished by the Code in express terms, and its importance in a court of equity is too manifest to allow the belief that it was intended to be taken away by implication. (*This agrees with Forrest agt. Forrest*, 5 *How.* 125, *and* 10 *Barb.* 48; *and is adverse to Fuller agt. Emeric*, 2 *Sand. S. C. R.* 626).

The Code in its practical operation briefly considered.

Where the writ of *ne exeat* was issued and served with the summons in the ordinary manner of issuing and serving an injunction, *held*, sufficient. That is, it is not necessary to *file the complaint first*.

Brooklyn Special Term, November 1852. The complaint sets forth that in 1843 the plaintiff was married to the defendant in Queens county; that at the time of her marriage she was in comfortable circumstances, and possessed of a personal estate of the value of $6000, and of real property worth $1500; that soon after the marriage the defendant obtained the possession and control of said property and spent the same; that in 1845 they removed to Brooklyn and kept boarders; that in 1846 they removed to the city of New York, where the plaintiff was compelled to earn her daily support by serving for hire; that in December of that year, the defendant having expressed to her his intention of going to Cincinnati to prosecute the profesion of a dentist, she sold her watch and a few other articles of personal property which she had retained, and applied the proceeds to purchase an outfit and pay the expenses of his journey; that he left New York for Cincinnati with the avowed intention of returning in four months, but in fact he abandoned her and she has never seen him since; that she next heard of him in 1848, when she was informed that he was employed as treasurer of a theatre at Washington in the District of Columbia; that she wrote to him and received from him a few small remittances, but that she has not received any aid or support, nor communication from him since November 1849. She further states that she is now entirely

destitute and in great want, and supports herself from day to day by washing clothes for hire, while the defendant is engaged in a lucrative business and has an income of over five thousand dollars per annum; that he is general agent of Catharine Hayes, a professional vocalist, and that he is about to go to California, as she is informed and believes. The complaint prays for a separation from bed and board, and a suitable support and provision to be furnished her by the defendant, and for a writ of *ne exeat*.

The complaint is accompanied by an affidavit of the plaintiff's attorney, stating that on the 14th or 15th October 1852, he called at the passenger office of the United States Mail Steam-ship Co. in the city of New York, and found among the names of the passengers engaged to sail in the steamer Illinois, on the 20th October, for Aspinwall, "Miss Catharine Hayes and Mr. Bushnell;" that the deponent is informed and believes that said Mr. Bushnell is the defendant; and that he is also informed and believes that said defendant is the general agent and secretary of the said Catharine Hayes.

Upon these papers being filed, a writ of *ne exeat* was issued by the court on the 18th of October. The summons and writ were served on the 20th of October upon the defendant, who gave security in the sum of $5000, and proceeded on his voyage to California.

The defendant now moves to vacate said writ and discharge the surety.

C. P. KIRKLAND, *for Defendant.*
JOHN J. TOWNSEND, *for Plaintiff.*

BARCULO, Justice.—Three reasons are urged by the defendant's counsel for granting this motion.

1st. It is contended that there is not sufficient evidence of the defendant's *intention* to depart from the state. The allegations in the complaint, in this respect are made upon information and belief; and such allegations are, as a general rule, insufficient (Etches vs. Lance, 7 *Ves.* 417; Mattocks vs. Tremain, 3 *John. Ch. R.* 75). But this is not a mere case of information and belief. Mr. Townsend in his affidavit swears to facts and cir-

cumstances in relation to the sailing of the steamer, and the defendant's name being in the list of passengers, which fully authorized the inference of his intended departure. It is impossible in many cases to obtain *knowledge* on such subjects; for those who only can give it, are interested in withholding it. That the inference was correctly drawn in the present case, is demonstrated by the fact that the defendant did sail for California on the day it was supposed he would.

2d. It is urged that the writ must be discharged, because it was issued before the suit was commenced. The facts show that the complaint and affidavits were presented to the court; the writ was allowed and the papers were then filed and the writ issued and served, simultaneously with the summons.

Under the former practice, as laid down in the books, it was undoubtedly the rule that the bill must be filed *before* the writ could be issued (1 *Hoff. Ch. Pr.* 90). The reason assigned for this in the English courts was, that until the suit was commenced no affidavit could be made, on which an indictment for perjury would lie (Hughes vs. Ryan, 1 *Beatty*, 327).

It is hardly necessary to say that such reasoning is inapplicable to our present system of conducting actions. The filing of a complaint is no longer necessary to the commencement of a suit. Nor was the English doctrine ever adopted in this state that an affidavit could not be made before the bill was filed. On the contrary, it has long been our practice on moving for injunctions, to read affidavits, for and against the motion, before the bill or complaint is filed. To say that before bill filed no affidavit can be made, upon which a prosecution for perjury can be maintained, is to deny the power of verifying the bill itself. The rules of our late Court of Chancery expressly authorized the complainant to annex affidavits to a bill praying for an injunction or *ne exeat* (*Chancery Rules*, 37). The same principle was incorporated in our rule of 1847 (*Rule* 27). This writ was issued and served with the summons in the ordinary manner of issuing and serving an injunction, and I think the proceeding is in that respect entirely regular.

3d. The more important point is, to determine whether the Code has abolished the writ of *ne exeat*. To maintain the affirm-

ative of this proposition, section 178 is relied on. It provides that "no person shall be arrested in a civil action, except as prescribed by this act; but the provision shall not affect the act to abolish imprisonment for debt, and to punish fraudulent debtors, passed April 26th, 1831, or any act amending the same, nor shall it apply to proceedings for cotempt." The next section enumerates the cases in which the defendant may be arrested, as prescribed by the Code; but it does not include a case of the kind now before us. If, therefore, section 178 applies to a *ne exeat*, there is no mode by which a defendant can be kept within the jurisdiction of the court at the suit of his wife, for abandonment or conjugal infidelity. I can not believe that the legislature intended to deprive the courts of this power so indispensable to the administration of equitable jurisprudence. A court of equity without the authority to compel a party to remain within its jurisdiction until its judgment is pronounced, must be utterly powerless in regard to many matters of equitable cognizance. In this case, the defendant having departed for a distant country, a discharge of this writ will be a virtual determination of the cause against a lady who seems to have been very badly treated; for she can have no inducement to involve herself in the expense of a lawsuit, when the court admits at the very outset, that it has no longer the power to enforce its decrees, or do justice to the oppressed. The legislature must speak more explicitly before I shall believe that this arm of the court of equity has been lopped off by the ruthless hand of innovaton; and when that time does come, it may perhaps be worth while to inquire whether such a maimed trunk corresponds with the constitutional description of a "Supreme Court having *general* jurisdiction in law and equity."

The provisions of the Code under the title of "arrest and bail," may be fairly construed to refer to and govern the cases named therein. In other words the Code is substituted for the old mode of arresting defendants in legal actions. But it is worthy of remark that nothing can be found in that act, either in the enumeration of the causes of action in section 167; nor in the provisions relating to arrest and bail, applicable to the case of divorce and many other equitable actions. It was stated by the

learned counsel for the defendant on the argument, that the defendant might be arrested under the Code; and this seemed to be conceded by his antagonist. But I apprehend these gentlemen were both mistaken. The only clause which has the least resemblance to such a case is the 5th subdivision of § 179, which authorizes an arrest when the defendant has removed or disposed of his property or is about to do so, "*with intent to defraud his creditors.*" This, however, has clearly no application, for the reason that the wife can not be deemed a *creditor* who is to be defrauded. It is true that an injunction may issue to restrain a defendant from removing his *property* beyond the jurisdiction of the court; but that does not prevent him from taking passage on board of a steamer and going to foreign parts; or crossing the river from New York to New Jersey; and if his property is all carried with him in his pocket, who is to reach or punish him for the contempt? Considering the facilities for leaving the state, it is obvious that in a case of this kind, all process which gives the defendant any liberty, after it is served, before it requires him to give bail, must fall short of the exigencies and the justice of the case.

In view therefore of the fact, that the Code has not expressly abolished the writ, nor given any thing as a substitute therefor; and deeming the power of awarding such process essential to the exercise of the legitimate powers of a court of equity, and not to be taken away by implication, I am constrained to hold that this court still possesses the authority to retain a suitor by *ne exeat.*

I am not unaware that this conclusion is contrary to the declared intention of the Code makers. They say in their report, "the writ of *ne exeat* or equitable bail, we propose to abolish as *unnecessary* to our system." "I can not," in the language of Justice EDMONDS in Forrest agt. Forrest (5 *How. Pr. R.* 125, *and* 10 *Barb.* 48), "receive the avowal of their intention in recommending the law, as conclusive evidence of the intention of the legislature in passing it, nor as any thing but very imperfect evidence of its real meaning." These same gentlemen informed us that by the aid of their system of special pleading, they could "frame a Code of legal procedure, *simple* in its construction,

easily *understood*, and efficient for all the purposes of *justice*." And yet, special pleading has been tried, and in part, at least, abandoned; and we look in vain for the performance of the flattering promises. It is unnecessary to tell any respectable member of the profession that these objects have not been accomplished. The fact is too well known, too universally acknowledged to need repetition. Indeed, if any thing more was designed than to confo und lawyers, perplex judges, increase litigation, and bring the administration of justice into confusion, uncertainty and disrepute, the Code has been as complete a failure as can be found in the annals of legal quackery.

It is proper to state, however, in this connection, a circumstance which is not noticed in the opinion of the court in Forrest agt. Forrest, nor in the adverse opinion of the Superior Court in Fuller agt. Emeric (2 *Sand. S. R.* 626), viz: that it was true, to a certain extent, that the writ of *ne exeat* was rendered unnecessary by the original Code; for that contained a provision for arresting a defendant who is "not a resident of the state, or is about to remove therefrom" (§ 156, *Code* 1848). That clause might have been allowed by the commissioners to be a substitute for the writ, but it was repealed in 1849; and thus the argument that the writ is unnecessary because of a substitute, is annihilated; and by the same rule that we could infer from the declaration of the commissioners, their intention to abolish it, we should also infer from the act of the legislature a design to retain it.

It would seem, indeed, that section 156 was originally the principal foundation for arrest, and that it was specifically designed as a substitute for equitable arrests. Its terms were of a general character requiring merely an affidavit of *a sufficient cause of action*, and of the non residence of defendant or his intention to remove from the state; and this last clause is declared not to be applicable to the particular causes of arrest enumerated in section 154. Of this title, the commissioners say in their report, "we have adhered generally to the principle of the existing laws, although in some respects, we have restricted the right of arrest, particularly by requiring in all cases an order of a judge, and *in most cases*, an affidavit that the defendant is not a resi-

dent of the state, or is about to remove therefrom" (*Comm'rs Rep. p.* 161). It is clear that these "most cases" were those covered by section 156 which was changed by the legislature so as to leave no substitute or provision for equitable actions.

The motion must be denied with $10 costs.

SUPREME COURT

JOHNSON agt. SNYDER.

Where one copartner, with the consent of the other, made an assignment of a portion of the partnership property for the payment of partnership debts; and an original bill was filed for a partnership account, but before the appearance of the *assignee* as one of the defendants, he died; and a trustee having been appointed by the court in his place. *Held*, that such trustee was a necessary party, and that the proper way to make him such was by *supplemental bill*. Otherwise, if he had been the only party defendant.

A supplemental bill in such case, although it sets out at length the allegations contained in the original, is not for that cause demurrable.

New York Special Term, November 1852. *Demurrer to Supplemental bill.*

T. E. STEWART, *for Defendant.*

J. N. PLATT, *for Plaintiff.*

EDWARDS, Justice—It appears from the original bill that Johnson, with the assent of Snyder, made an assignment of a portion of the partnership property for the payment of the partnership debts. The original bill was filed for a partnership account, and the assignee was a necessary party, as there could not be a complete accounting unless it should be ascertained how far the assigned property had been applied in payment of debts. Upon the death of Schenck, the original assignee, and the appointment of a new trustee by this court, it became necessary that such new trustee should be made a party to the suit; and the proper way to make him such party was by a supplemental bill (King vs. Donelly, 5 *Paige*, 46; 3 *P. Williams*, 351); and the fact

that Schenck had not appeared to the original bill, is no objection to this method of continuing the suit. If he had been the only party defendant, a new original bill would have been proper.

I do not think that it was necessary to set out at length, the allegations contained in the original bill; but it does not follow that for that reason the bill is demurrable. The supplemental bill does not call upon Snyder to make answer to any except the supplemental bill, and if there is any unnecessary prolixity he is not injured by it.

The demurrer is overruled, with leave to the defendant to answer in twenty days.

SUPREME COURT.

ROBERTS agt. MORRISON IMPLEADED WITH GROESBECK.

A motion for judgment on account of the frivolousness of the demurrer (§ 247), *is the trial of an issue of law;* and a determination upon it is a *judgment.* The prevailing party is therefore entitled to the *costs* taxable for a *trial* (some $23).

New York Special Term, January 1853. *Costs upon affirmance of judgment upon Demurrer.* Defendant Morrison demurred to plaintiff's complaint. Justice ROOSEVELT at special term, on the 6th of October 1852, decided against the demurrer. The order states "the plaintiff having moved for judgment on said demurrer *as frivolous,*" "ordered, that the plaintiffs have *judgment on the demurrer with costs,* with leave," &c. From this decision there was an appeal to the general term.

The general term, on the 30th of December 1852, affirmed the judgment of the special term and in their order state, "it appearing to the court that the demurrer of the applicant *was frivolous,* and that the complaint of the respondent is sufficient, it is ordered that *the said judgment on demurrer be affirmed* with ten dollars costs of this appeal."

Upon this statement the counsel for the plaintiff claims, that the argument of the demurrer was the *trial* of an issue of law, and that the decision of the special term is a *judgment* in the

case, and the costs given by the order mean taxable costs *upon trial*, amounting to some $23.

The counsel for defendant claims that the argument before the special term was only *a motion* for judgment on the demurrer *as frivolous*, and that the decision entitles the plaintiff to *only ten dollars* costs. In furtherance of this view he referred to the plaintiff's notice of argument which is as follows: "We shall apply to Justice ROOSEVELT at the New York chambers *for judgment* on the demurrer of the defendant Morrison *as frivolous*; which motion will be founded upon the complaint and said demurrer. We shall also *ask for costs of the motion*; or for such other or further relief as to the court may seem meet."

——— ———, *for Defendant.*
——— ———, *for Plaintiff.*

MORRIS, Justice.—The language of a notice can not characterize the action of the court. The *action* of the court must control, and not the impression of parties or counsel, of the character of such action.

Section 249 of the Code establishes "an issue of law arises upon a demurrer to the complaint, answer or reply, or to some part thereof." Section 252 of the Code declares, "a trial is the judicial examination of the issues between the parties, whether they be issues of law or fact." Section 253 of the Code directs "an issue of law must be tried by the court."

Section 245 of the Code prescribes, "a judgment is the final determination of the rights of the parties in the action."

Section 247 of the Code is as follows: "If a demurrer, answer or reply, be frivolous, the party prejudiced thereby, upon a previous notice of five days, may apply to a judge of the court, either in or out of court, for judgment thereon, and judgment may be given thereon."

Therefore in this case, whether the demurrer was heard by Justice ROOSEVELT out of court, or presiding at special term, the hearing was the *trial* of *an issue of law*, and his determination upon it, "is a judgment, a final determination of the rights of the parties in the action."

The plaintiff is entitled to costs of trial of an issue.

SUPREME COURT.

Brevoort agt. Randolph.

In the city of New York a mortgagee acquires a *right* to redeem the premises as soon as they are *assessed* (for city purposes); and if he pays the amount of the assessment at any time before the expiration fixed by the statute he acquires a *lien* thereon, and may add the same to his mortgage debt and collect it by foreclosure.

Therefore, a purchaser at an assessment sale must pay, or tender to the mortgagee the amount due on his mortgage, and the amount paid by him in redemption of the property, in order to extinguish his lien.

New York Special Term, February 1853. *A question of redemption under a corporation sale on a mortgage foreclosure.* The following statement of facts were agreed upon by the respective counsel:

Mortgaged premises sold on the 28th June 1843, by the corporation of the city of New York, at an assessment sale, for non payment thereof. Were struck off to defendant for $166·09, upon a lease for one thousand years.

On the 11th June 1845, Breevort, plaintiff, deposited with the street commissioner $214·59 to redeem. Defendant, as purchaser, received $214·59, less $2 for commisions, shortly after the 11th June 1845.

Only notice of redemption was first published 12th December 1844.

On the 8th March 1852, defendant tendered to plaintiff $2765, in payment of the bond and mortgage, costs and interest. Not accepted.

Samuel Sherwood, *for Defendant.*

H. L. Riker, *for Plaintiff.*

Edwards, Justice.—It is not pretended that the proceedings of the corporation in assessing the mortgaged premises were irregular. It is said, however, that after the sale of the property, the notice required by the statute had not been given, in order to cut off the right of redemption. If such was the case, the irregularity had no other effect than to extend the period of re-

demption. The mortgagee's right to redeem was complete as soon as the property was assessed, and if he paid the amount of the assessment at any time before the expiration of the time for redemption fixed by the statute, he acquired a lien upon the premises (*Laws of* 1813, *p.* 420, 421).

It is admitted in this case that the mortgagee did pay the assessment before the time for redemption had expired; and having done so, he had the right to add to his mortgage debt the amount which he thus paid, and to collect the same by foreclosure and sale, unless the mortgagor paid or tendered him the whole amount by way of redemption (Eagle Ins. Co. vs. Pell, 2 *Edw.* 631, 634; Faure vs. Winans, *Hopk. Ch.* 283; Dale vs. McEvers, 2 *Comst.* 118).

The amount due to the mortgagee, at the time of the alleged tender was the amount secured to be paid by the mortgage, and the amount paid for the assessment. The amount alleged to have been tendered, was only the amount due upon the mortgage and was insufficient.

The plaintiff is entitled to a decree for the whole amount claimed to be due upon the bond and mortgage, and for the amount paid by him in redemption of the property with interest.

SUPREME COURT.

Campbell agt. Ewalt and McKay.

A complaint alleging a criminal offence on information and belief, *without stating any facts*, will give a justice of the peace *jurisdiction* to issue a warrant of arrest, although he grossly errs in exercising that jurisdiction.

Of course an action for false imprisonment in executing the warrant will not lie. (*This is adverse to Wilson agt. Robinson*, 6 *How. Pr. R.* 110).

Livingston Special Term, February 1852. *Motion on the part of the plaintiff, upon a bill of exceptions, to set aside a nonsuit and for a new trial.* This was an action for false imprisonment, tried at the Livingston circuit before Justice Taylor, at the

September term, 1851. Ewalt made a complaint before McKay, a justice of the peace, against Campbell, on a charge of subornation of perjury, which complaint was upon information and belief only. without setting forth any facts, and upon which McKay isued a warrant, by virtue of which Campbell was arrested. Justice TAYLOR held that the magistrate acted in compliance with the requirements of the statute in issuing the warrant, and it was therefore a protection to the officer, as well as the person at whose instance the warrant was issued, and directed that the plaintiff be nonsuited. The plaintiff now moves on a bill of exceptions to set aside the nonsuit, and for a new trial.

H. M. BARNARD, *for Plaintiff.*

A. A. HENDEE, *for Defendant McKay.*

J. WILKINSON, *for Defendant Ewalt.*

T. R. STRONG, Justice.—It is very clear that the complaint upon which the warrant was issued and under which the plaintiff was arrested and imprisoned, and for which arrest and imprisonment this action was brought, did not set forth a criminal offence, and that the defendant McKay grossly erred in deciding that it appeared from the examination a criminal offence had been committed, and in causing the plaintiff to be arrested. But the complaint gave him jurisdiction of the case, and he appears to have pursued the course prescribed by statute (2 *R. S.* 706, § 2 and 3). He did not err in taking jurisdiction, but his errors were in his decisions in the exercise of his jurisdiction, and consisted in coming to wrong conclusions as to the law upon the facts. It is well settled that he can not be made liable as a wrong doer for the issuing and execution of process under such circumstances. The case of Stewart vs. Hawley (21 *Wend.* 553), is in point. See also the cases therein stated. It follows that the warrant of the justice was valid, and that was a perfect protection to defendant Ewalt (*same authorities*). The motion to set aside the nonsuit is therefore denied.

COURT OF APPEALS.

CAHOON AND OTHERS agt. THE BANK OF UTICA.

A complaint to compel the defendants to pay over a surplus of money received on a mortgage, given as collateral security for payment of certain promissory notes; and to require the delivery up of those notes, to be made available against third persons, for the plaintiff's benefit. *Held* not to contain two distinct causes of action.

(*This decision reverses that of the Supreme Court at general term, in this case, reported ante page* 134.)

December Term, 1852. For a statement of the facts of this case, *see ante page* 134, where the same case is reported with the opinion of Justice GRIDLEY, delivered at special term, and by the court, W. F. ALLEN, Justice, at general term, affirming it.

By the Court, JOHNSON, J.—The ground on which this case ought to be put is, that the complaint does not contain two causes of action. The claim is single. It stands substantially in the same position as if Brown himself were plaintiff. The gist of it is that Brown had placed in the possession of the Bank of Utica, a mortgage, the proceeds to be applied to pay three notes; one made by Brown and Rossiter, and the others by Brown, and the surplus to be returned to him. His assignees now seek an account of the proceeds of the mortgage and of their disposition, and to have the balance paid over, and the notes which are satisfied, delivered up. It is no answer to say that the balance of moneys could have been recovered in an action for money had and received. It would none the less have been the proper foundation for a bill in equity. Suppose instead of a single security, transferred to secure debts to a single person, twenty different securities had been transferred to the bank to secure debts due to twenty different persons, does any one doubt that the remedy would be in equity. It is only because there is no dispute about the amount due, that there seems to be any room for mistake as to the character of the claim. If that remained to be ascertained, it would be the clearest possible case for an account, and yet this case is not clearer than that before us. For

surely the accidental circumstance of the absence of a dispute as to the amount, can hardly be deemed to alter the nature of the party's rights.

Considering this proposition to be established, it remains to say a few words in regard to the claim to have the notes delivered up. Whatever may be the case as to Brown's own notes, he had a clear interest to regain possession of the note of Brown and Rossiter, in order to be able to use it as a voucher in stating an account with Rossiter, and therefore, having extinguished it by his own means, he had also a clear right to have the note delivered up and cancelled; and an account of the securities pledged for them and payment of the overplus. That a claim so simple in its character, so well recognized and even familiar under the old practice in chancery should be seriously regarded as two distinct causes of action, requiring distinct modes of trial, and incapable of being joined in a single suit, is quite as surprising as the doctrine itself, if held to be well founded, would be inconvenient.

COURT OF APPEALS.

PUGSLEY respondent agt. KESSELBURGH AND OTHERS appellants.

It is not necessary that the *record* should show the identity of a suit commenced before a justice of the peace with that commenced in the Supreme Court for the same cause of action, where title to land is pleaded before the justice. Motion papers may be examined to ascertain that the suit was commenced in a Justice's Court.

And where the suit in the Supreme Court appears to be so situated that the plaintiff on recovering less than $50, would be entitled to full costs, even if title did not there come in question; it must be held to have originated in a Justice's Court; and this court have no jurisdiction (*Brown agt. Brown*, 6 *How. Pr. R.* 320).

January Term, 1853. *Motion to dismiss appeal.* The plaintiff commenced a suit in October 1848, against the defendants before a justice of the peace of Columbia county, and complained against them for breaking and destroying his fences, and entering upon and injuring his lands and crops growing thereon. The

defendants in their answer justified the entry, alleging that they were commissioners of highways of the town where the premises entered upon were situated; that the premises were of right a public highway, but had been enclosed and the highway obstructed by the plaintiff, and that the acts complained of were done by them, in removing such obstruction and repairing the highway. The plaintiff replied denying the facts alleged in the answer. The defendants delivered to the justice, with their answer, an undertaking, such as required by the statute, where the title to lands is put in issue before a justice of the peace, which was approved by the justice; and thereupon a suit was commenced by the plaintiff against the defendants in the Supreme Court for the same cause of action, and issue was joined upon pleadings similar to those which were filed with the justice. The issues were tried in June 1849, at the Columbia circuit, where the plaintiff obtained a verdict for twenty-five dollars upon which judgment was subsequently entered. A motion for new trial was denied by the Supreme Court, and the defendants appealed to this court. The record set forth in the return, and in the printed case before this court, contained no reference to the proceedings before the justice.

K. MILLER, *for the Respondent*, on affidavit showing the foregoing facts, now moves to dismiss the appeal.

J. H. REYNOLDS, *for Appellants.*

By the Court, JOHNSON, J.—In Brotherson vs. Wright (15 *Wend.* 257), and The People vs. The Albany Com. Pleas (19 *Wend.* 123), it appears not to be necessary that the record should show the identity of the suit in the Common Pleas with that begun in the Justice's Court; for although it did not in those cases appear from the record, yet the suits were regarded as continuations of those commenced in the Justices' Courts. If this be so, then unless we are prepared to reject the authority of Brown vs. Brown (6 *How. Pr. R.* 320), in this court, we must look into the motion papers to see whether the suits are thereby shown to have been commenced in Justices' Courts. If they appear to be so situated, that in the Supreme Court the plaintiffs, on recovering less than $50, would be entitled to full costs against

the defendants, even if title did not there come in question, then I think under the case of Brown vs. Brown, we must hold them to have originated in a Justice's Court. In this case it plainly appears from the affidavits that the cause did, in the sense of the rule, originate in a Justice's Court, and therefore the appeal must be dismissed. Motion granted, with ten dollars costs.

COURT OF APPEALS.

WIGGINS AND OTHERS Comm'rs of Highways &c. agt. TALLMADGE.

Where a defendant fails to comply literally with the terms of an undertaking filed with a justice of the peace, on raising a question of title (§ 56), by omitting to give the *written admission* of service of the summons and complaint, but puts in his answer in the Supreme Court, and the plaintiff accepts it without such admission, *held*, a substantial performance, and that the waiver does not affect the identity of the suits before the justice and in the Supreme Court.

The Code (§ 60) says that "the answer of the defendant shall be the same which he made before the justice." But this does not require the defendant to use the identical words in his second answer, only the same *substantial defence.*

And the defendant may abandon part of his defence before the justice, when he comes to answer in the Supreme Court and yet the defence may be the same, within the meaning of the statute.

Where the suits in the Justice's Court and Supreme Court are identical, this court have no jurisdiction on appeal (*see Brown agt. Brown*, 6 *How. Pr. R.* 320, *and Pugsley agt. Kesselburgh*, *ante page* 402).

Motion to dismiss appeal. In the month of May 1849, the plaintiffs commenced an action against the defendant before Robert A. Ogden, a justice of the peace of the county of Saratoga. On the 19th day of May, which was the return day of the summons, the parties appeared before the justice, and the plaintiffs complained against the defendant, and alleged that he had obstructed a certain highway in the town of Malta (Saratoga county) by building three several fences in and across the same; and had also injured said highway by digging holes therein. The plaintiffs, as commissioners of highways of the town of Malta,

claimed to recover from the defendant, the penalties provided by statute for such wrongful acts, and demanded judgment for $55 and costs.

The defendant put in an answer in writing signed by his attorney, denying the complaint, and showing that the title to real property would come in question on the trial; and at the same time delivered to the justice an undertaking, such as is required by § 56 of the Code of 1849. The justice thereupon countersigned the answer and delivered it to the plaintiffs or their attorney, and approved of the undertaking both as to form and as to the sufficiency of the surety, and discontinued the action.

On the 25th of May, the plaintiffs deposited with the justice a summons and complaint in an action in the Supreme Court, and complained for the same cause of action only on which they relied before the justice, and demanded judgment for the same amount.

The answer put in by the defendant before the justice, denied the obstruction alleged in the complaint, and the answer in the Supreme Court admitted it, and relied only upon the justification set up in the answer in the Justice's Court; both however raising, distinctly, the question of title. Upon the service of this answer, the plaintiffs stated that the admission in writing required by the said 56th section of the Code was thereupon waived; and insisted that the answer was the same as that put in before the justice.

The defendant claimed that soon after the commencement of the suit in the Supreme Court, there was an understanding, either by letter or verbally, between the attorneys, that the formality of continuing the suit before the justice should be abandoned, and that he would answer so as to raise distinctly the question of title in such manner as to give the prevailing party costs, without reference to the answer before the justice; which arrangement he understood the plaintiffs' attorney to assent to; and insisted that the answer was different, in form and substance, from that put in before the justice. That he never asked the plaintiffs or their attorney to waive the admission of serving the summons and complaint by the defendant, unless the facts before stated should be construed into such waiver.

JAMES B. MCKEAN, *Attorney and Counsel for plaintiffs.*
E. F. BULLARD, *Attorney, and*
N. HILL JR. *Counsel for defendant.*

By the Court, JOHNSON, J.—The general question involved in this motion has been settled in Pugsley vs. Kesselburgh, decided at this term (*ante p.* 402). Two grounds of distinction between the cases are relied upon.

1st. That the admission of service of complaint and summons, required to be given by defendant, was not given. The defendant executed the proper undertaking under section 56 of the Code of 1849, but has not literally complied with its terms. The object of the undertaking when it provides for this admission, seems only to be to ensure the defendant's appearance in the Supreme Court, without putting the plaintiff to the trouble of serving him with the summons and complaint or of making proof by affidavit of such service. We think that this obligation was substantially performed by the defendant's putting in an answer, the plaintiff having accepted the answer without the written admission, and so having waived his right to require a literal compliance with the terms of the undertaking. This waiver does not at all affect the identity of the suits.

The second ground taken is, that the answer in the Supreme Court is not the same as that before the justice. The Code (§ 60) provides that "the answer of the defendant shall be the same which he made before the justice." This is a right secured to the plaintiff and introduced for his benefit; that the defendant having by one answer ousted the jurisdiction of the justice, shall not resort to a different defence in the Supreme Court. The section likewise provides that "the plaintiff shall complain for the same cause of action only on which he relied before the justice." This obviously does not tie the plaintiff up to the exact form of words that he used before the justice; but only confines him to the same substantial cause of action. So likewise, the provision that the defendant's answer is to be the same, does not require the same identical words, but only the same substantial defence. In this case the answer in the Supreme Court is attempted to be expressed in more lawyerlike phrases than that in the Justice's

Court, and to this there is no objection. It may be still only the same defence. Such, likewise, was the old rule (The People vs. The Albany Com. Pleas, 19 *Wend.* 123).

The answers in this case, however, differ in substance; that before the justice denies the obstruction alleged in the complaint, while that in the Supreme Court admits it, and relies only upon the justification set up in the answer in the Justice's Court. I think that the defendant may abandon part of his defence before the justice when he comes to answer in the Supreme Court, and that, notwithstanding, the defence will be the same within the meaning of the statute. The object of the provision is to prevent new defences being interposed in the Supreme Court, not to require old ones to be insisted on when found not to be tenable. It would put the plaintiff strangely in the defendant's power, if by abandoning one of his defences he could deprive the plaintiff of the benefit of the statute; and it would be equally inconvenient to hold that in order to have the benefit of the statute, the plaintiff must by motion compel the defendant to interpose a defence which he no longer desired to rely upon. Yet one or the other of these views must be adopted unless the practice is settled as before mentioned.

This case must therefore follow that of Pugsley vs. Kesselburgh. Motion to dismiss granted with ten dollars costs.

COURT OF APPEALS.

WATERMAN AND OTHERS resp'ts agt. WHITNEY AND OTHERS appel'ts.

ISABELLA VAN EPPS agt. H. V. D. VAN EPPS.

Unless the respondents can show some delay or inconvenience in not making the return in pursuance of Rule 2, or not serving the cases as required by Rule 7, the defaults taken under those rules should be relieved against upon terms, in all cases where it appears that the appeals are brought in good faith.

January Term, 1853. Each of these motions is to relieve the appellant from a dismissal of his appeal by default; the first

in not procuring the return to be filed in twenty days after the appeal was perfected, and the other for a similar default in not serving printed copies of the case within forty days after the appeal was perfected.

A. BIRDSALL, *Att'y and Counsel for appel'ts in 1st case.*
THOS. G. WATERMAN, *Attorney, and*
B. DAVIS NOXON, *Counsel for respondents.*
H. V. D. VAN EPPS, *Appellant in person, and*
SAMUEL STEVENS, *Counsel in the 2d case.*
S. D. VAN SCHAACK, *Attorney, and*
M. T. REYNOLDS, *Counsel for respondents.*

By the Court, JOHNSON, J.—In the case of Dresser vs. Brooks (2 *Comst.* 559; *also* 4 *How. Pr. R.* 207), which was a default in not serving printed copies of the case, BRONSON, J. said, "although respondent has been regular, appellant would be relieved on terms, if we had power to grant it." In that case, however, relief was denied, the remittitur having been sent down. I do not see why the same rule should not be applied in these cases. In neither case has the argument of the cause been delayed for want of the papers, and in each, counsel swear that the appeal is brought in good faith, and with the expectation of success; and although that expectation may be disappointed, yet we can not now see that the appeals are frivolous, or brought for delay. Unless the respondent can show some delay or inconvenience from the non service of the papers, I think these defaults ought to be relieved against in all cases where good faith appears, on terms, in analogy to the old rule for relieving against defaults for want of a plea. In the first of these cases, the motion should be granted upon condition that within twenty days appellants cause the return to be duly filed, and pay the respondents $10 costs of opposing this motion, or otherwise that it be denied with $10 costs.

In the last case the motion should be granted on condition that appellant serve the printed cases within thirty days and pay $10 costs to the respondent, otherwise that it be denied with $10 costs.

COURT OF APPEALS.

VICTORIA LALLIETTE, resp't agt. CORNELIUS VAN KEUREN, appel't.

An affidavit to ground a motion to dismiss an appeal because the suit in the Supreme court is a continuation of one commenced before a justice must show the fact in terms, that the justice was ousted of jurisdiction by the giving of the *undertaking required by § 56 of the Code.*

January Term, 1853. *This was a motion by the respondent to dismiss the appeal in this action upon the ground that the court had no jurisdiction.* The affidavit upon which the motion was founded, reads as follows:

(Title of the cause.) "Cayuga County, ss: Paris G. Clark, of Auburn in said county, being duly sworn, says, that this action was originally commenced in a Justice's Court, where the plaintiff declared against the defendant in trespass for breaking into and entering upon her premises; and the defendant by his answer plead title to the *locus in quo*. That thereupon the justice discontinued the action and the same was commenced in the Supreme Court, according to the statute in such case made and provided. And the said action was tried in the Supreme Court upon the same pleadings, substantially, as were interposed in the said Justice's Court. And that judgment was entered in the said action in the said Supreme Court in favor of the said plaintiff, from which the said defendant has appealed to this court.

And this deponent further says that he was one of the attorneys for the said plaintiff in the said action in the Supreme Court, and is the attorney for the respondent in this court."

(Signed, &c.)

PARIS G. CLARK, *Attorney, and*
N. HILL JR. *Counsel for respondent.*

JAMES R. COX, *Attorney, and*
WARREN T. WORDEN, *Counsel for appellant.*

By the Court, RUGGLES, Ch. J.—The affidavit on which the motion to dismiss the appeal is founded, is fatally defective in not showing that the justice of the peace was ousted of his jurisdiction by the giving of the undertaking required by the Code,

section 56. This suit can not be regarded as a continuation of that before the justice, unless the party was prevented from going on before the justice, by the filing of the undertaking there, as well as the plea of title.

The motion must be denied with ten dollars costs; but without prejudice to a future motion on sufficient affidavits.

COURT OF APPEALS.

FITCH AND OTHERS, resp'ts agt. LIVINGSTON & FLANAGAN, appel'ts.

After argument and judgment, it is too late to alter a bill of exceptions in the cause.

A bill of exceptions is bad for want of particularity, which says "To which charge the defendant's counsel excepted."

January Term, 1853. This was an action on the case commenced in the Superior Court of the city of New York in 1847, by Fitch and others, plaintiffs, and owners of the steam boat Santa Claus, against Livingston & Flanagan, owners or proprietors of the steam propeller Ocean, for running afoul of the Santa Claus on the Hudson river, and damaging her.

The cause was tried before Chief Justice OAKLEY, on the 12th of June 1849, and several days following. A large number of witnesses were examined. At the close of the testimony, the defendant's counsel requested the judge to charge the jury on nineteen separate propositions. The charge of the judge contained seven distinct points, in some of which it was apparent that the judge had committed no error. The defendant's counsel then excepted as follows: "*To which charge the defendant's counsel excepted.*" The plaintiffs recovered judgment for damages and costs, $4296·11, from which the defendants appealed to this court.

The cause was brought on to argument in this court on the 14th January 1853. B. DAVIS NOXON, counsel for the appellants, proceeded to open the case; when N. HILL JR., counsel for respondents, raised an objection to the sufficiency of the *exceptions*

taken to the judge's charge. This question being briefly discussed, the court decided the exceptions insufficient—too general—not specific, and ordered judgment of affirmance.

On the 24th of January 1853, C. L. BENEDICT, the attorney and counsel for appellant, moved on notice, affidavits and papers to set aside the judgment of affirmance and for a stay of proceedings, and for leave to apply to the Superior Court to have the bill of exceptions resettled, so as to present those questions of law which were actually made at the trial, by exceptions there taken, and which were passed upon at the general term, &c. and cited Livingston agt. Miller, *ante page* 219. N. HILL JR. for respondents, opposed the motion.

The court held the papers under advisement a few days, and denied the motion with $10 costs, with the following reasons:

"After argument and judgment, this court will not set aside the judgment and stay proceedings, to enable the appellant to make an application to the court below to alter the statement of the exceptions taken at the trial."

SUPREME COURT.

PLUMB, PRESIDENT &c. agt. WHIPPLES AND GATES.

The 172d section of the Code (1851) provides that a pleading may be *amended* "at any time before the period for answering it shall expire, or within twenty days after the answer to such pleading shall be served." Therefore a pleading which does not admit of an answer can not be amended under this section.

An answer which merely denies the allegations of the complaint can not be amended under this section. Why? Because there is no *new matter* in it requiring a reply or answer.

The right to amend, where it exists, is not to "*prejudice the proceedings already had.*"

Where the plaintiff took an inquest on the second day of the circuit, and entered judgment thereon, the answer of the defendant not requiring a reply, and not having been verified and no affidavit of merits filed, and the defendant amended his answer within time, but after the entry of judgment. *Held*, that the judgment was regular, allowing that the defendant had a right to amend.

Albany Special Term, 1851. *Motion by the defendant Gates, to set aside the judgment in this action against him, for irregularity.*

The action is upon a promissory note made by the defendants Whipple, and endorsed by the defendant Gates. The summons and complaint were served on Gates, on the 8th of March last. On the 27th of March, Gates served his answer by mail. On the *first* day of April, the plaintiffs' attorney served by mail a notice of trial for the Rensselaer circuit, to be held on the 21st of the same month. The answer not having been verified, and no affidavit of merits having been filed, the plaintiffs' attorney on the second day of the circuit, took an inquest; and on the 26th of April, upon due notice, had his costs adjusted, and perfected judgment.

On the 6th of May following, the defendant Gates amended his answer, and served a copy by mail. The first answer merely denies the allegations in the complaint. The amended answer alleges that the note, upon which the action is brought, is owned by the plaintiff's bank, and that the general banking act under which that institution is organized, is unconstitutional and void.

H. J. KING, *for Plaintiff.*

W. A. YOUNG, *for Defendant Gates.*

HARRIS, Justice.—By the defendants' answer, controverting the material allegations in the complaint, an issue of fact was made, which might be noticed for trial (*Code of* 1849, § 250, 256). The plaintiff's attorney was therefore regular, in serving notice of trial on the first of April. The defendant insists that, by the 172d section of the Code, he was entitled to amend his answer; and that having served his original answer by mail, the time to amend was extended to forty days. But I think he is mistaken in his main position. The section referred to, provides that a pleading may be amended "at any time before the period for answering it shall expire, or within twenty days after the answer to such pleading shall be served." In this case, the defendant's pleading did not admit of an answer. The plaintiff can only reply or demur to an answer when it contains *new matter* (*Code of* 1849, § 153). The provisions of the 172d section,

therefore, can not be made applicable to such a case. The defendant, in fact, had no right to amend his answer, after it had been served.

But if he had such right, if the answer had contained new matter to which the plaintiff had replied at the same time he noticed the cause for trial, still I think there would have been a conclusive answer to this motion. Then, the defendant would, indeed, have had the right to amend, and that right would have extended twenty or forty days from the time of serving the reply, according to the manner of service. But the right so to amend is not to "*prejudice the proceedings already had.*" Effect is to be given to this provision, and I understand it to have been intended for a case like that under consideration. The plaintiff had a right, when the cause was at issue, to notice it for trial. If the issue noticed for trial still remained, when the time for trial arrived, then he might try the cause, and, if successful, perfect judgment. None of these proceedings are to be prejudiced by a *subsequent amendment*, even although it should be made within the time prescribed by the statute. The plaintiff may notice his cause for trial before the time for amending the answer expires. He does so at his peril. That peril is, the contingency that before he can bring it to trial, the defendant may amend, and thus destroy the issue he had intended to try. On the other hand, the defendant takes the time allowed him to amend, at the peril of all regular proceedings which may be taken against him before he amends. Such proceedings, whatever they may be, are not to be *prejudiced* by the amendment.

The case of Morgan vs. Leland (1 *Code R.* 123), arose under a section of the Code of 1848, which was omitted in the revision of 1849, and which gave to the plaintiff the absolute right to amend his complaint within twenty days after demurrer (*Code of* 1848, § 124. Indeed, this case was not relied upon by the defendant's counsel upon the argument of the motion. Without reference, therefore, to the character of the defendant's amended answer, and conceding that the amendment was made in good faith, the plaintiff's judgment is regular and must stand. The defendant has misapprehended the effect of the section under which he claims the right to amend. He had not the right to

amend at all; but if he had, to have thrown the cause over the circuit, which was probably the end he had in view, he should have served his amended answer before the trial. The motion must be denied with costs.

SUPREME COURT.

SOUTHWORTH AND OTHERS agt. SHELDON AND OTHERS AND TWO OTHER CAUSES.

An assignment for the benefit of creditors, which authorizes the assignees to sell and dispose of the assigned property *upon such terms and conditions as in their judgment shall appear best and most for the interest of all the parties concerned. Held good.*

The provision alluded to merely authorizes the assignees to do what the law imposes upon them as a *duty*.

And a provision which directs *that the surplus after paying the preferred debts, shall be paid pro rata to all the other creditors*, does not render the assignment invalid, because the legal effect of such a provision is, that the assignees are to pay the *whole amount* of the unpaid debts, if assets sufficient.

New York Special Term, January 1853. *Demurrer to complaint.*

EDWARDS, Justice.—The assignment which is set forth in the complaint in this action, is alleged to be fraudulent and void, as against creditors, because it authorises the assignees to sell and dispose of the assigned property, upon such terms and conditions as in their judgment shall appear best and most for the interests of all the parties concerned.

In all cases the best interest, both of the assignor and of the creditors undoubtedly is, not that the property shall be sacrificed at once, and at all hazards, but that it shall be converted into money with all practicable dispatch, according to the circumstances of the case, and that it shall be sold for the highest price. But in order thus to promote the best interest of all parties concerned, the assignees must exercise their judgment. They are bound to do so. And the provision which is objected to merely authorizes them to do what the law imposes upon them as

a duty. Upon what principle then, either of law or of morals, can it be said that such a provision must of itself render an assignment fraudulent and void as against creditors? It is a provision which has been inserted in voluntary assignments for years, and until recently no one has thought of raising a question upon it. It is said, however, that it comes within the spirit of the decision in the case of Nicholson vs. Leavitt, in the Court of Appeals. The reason of that decision, as expressed in the opinion to which I have been referred, is, that it gives an absolute right to the assignee to sell upon credit, which can not be controlled by any proceedings which the creditors may institute; or, in other words, that the courts can not, upon the application of creditors, compel the assignee to convert the property into money at once, if they should deem it for the interest of creditors to do so. But that reason does not apply to the provison in question; for the court have as much power to control the assignee in the discharge of his duty as they would have if no such provision had been inserted in the assignment.

I think that the assignment is not fraudulent and void as against creditors, and that the defendants are entitled to judgment.

PRIOR AND OTHERS agt. TUPPER AND OTHERS.

Motion for injunction denied for the reasons above stated.

TAYLOR AND OTHERS agt. STEVENS AND OTHERS.

The first provision in the assignment in this case to which the plaintiffs object, is essentially similar to that which has been considered above in the case of Southworth vs. Sheldon.

The other provision which is objected is, *that the surplus, after paying the preferred debts, shall be paid pro rata to all the other creditors.* I think that the intention of the assignor was to authorize and direct the assignees to pay the *whole amount* of the unpaid debts, if there should be assets sufficient for that purpose. And such, I think, is its legal effect.

The motion for an injunction is denied.

SUPREME COURT.

Roche agt. Ward.

Where an *order* for service of summons and complaint, by publication, has been made on its appearing *to the satisfaction* of the justice that the necessary facts were stated, the court, at special term, should not set aside such an order for alleged irregularity, although they might think the evidence very slight upon which it was granted.

It is not the best way to administer the law.

Brooklyn Special Term, February 1853.

E. Terry, *for Plaintiff.*

Powers & Tallmadge, *for Defendant.*

Barculo, Justice.—The notice of motion in this case does not specify any irregularity, and therefore the defendant can not, consistent with the settled practice, avail himself of that objection to the plaintiff's proceedings. He asks to have the service of the summons and complaint set aside. In his points he contends that the affidavit on which the order for publication was granted (the defendant being a non resident), was defective in a variety of particulars. I am unable to discover any substantial insufficiency; and even if I should think that the evidence was slight as to "due diligence," or as to the defendant having property in this state, I should not feel at liberty to annul an order granted by a justice of this court, under a statute authorizing him to act on its appearing *to his satisfaction.* To encourage motions of this kind, is not the best way to administer the law, nor promote the ends of justice.

After the order of publication was made, the plaintiff caused the summons and complaint to be served personally on the defendant in Detroit, which the Code declares to be equivalent to publication and deposit in the post office (§ 135).

I do not discover any thing for the defendant to complain of, and the motion must be denied with $10 costs.

SUPREME COURT.

MARQUAT AND MARQUAT agt. MARQUAT AND WIFE.

The mere fact that the plaintiffs furnished to the defendants money to purchase land, does not give them an equitable lien on such land for the money so advanced. Such lien only exists as between vendor and vendee, or those representing them.

And where, as an inducement to the lending of such money, the defendants agreed to execute to the plaintiffs a mortgage on the lands purchased, *held*, that such promise was void by the statute of frauds. Such a contract being for the conveyance of an interest in lands, to be valid, must be in writing and subscribed by the party agreeing to execute the mortgage.

The advancing of the money by the plaintiffs in such case, is not such a part performance as will take the case out of the statute of frauds.

Where an action was commenced in such case against husband and wife, the title to the land purchased with the money lent having been taken in the name of the wife, and the only specific relief demanded in the complaint, was that the defendants execute to the plaintiffs a lien on such lands, by mortgage or otherwise, to secure the money so advanced, with a further demand for such other or further relief as the court might deem proper, and the defendants answered, denying, among other things, that the money was advanced on the credit of the said defendants, and alleging that it was advanced on the credit of a third person, which was denied in the reply, and on the trial it was established that the money was advanced on the credit of the defendants, and at their request, *held* (Justice PARKER dissenting), that the plaintiffs having failed to establish an equitable lien, were not entitled to recover against the husband the money so advanced, but that the complaint should be dismissed as to both defendants.

Justice PARKER, in dissenting, claimed that the case came within section 275 of the Code, and that the plaintiffs were entitled to recover judgment for the money so advanced, against the husband, who alone was legally capable of contracting, and that the plaintiffs ought not to be put to a second action to recover such judgment.

The practice applicable to such a case, before and since the adoption of the Code, reviewed and discussed.

Albany General Term, Feb. 1853—*before Justices* PARKER, WRIGHT and HARRIS. The plaintiffs state in their complaint, that about the 30th of April 1849, they lent to the defendants $300, to enable them to purchase certain real estate described in the complaint, upon an agreement that the defendants should secure the repayment of the loan by a lien upon the premises to

be purchased; that the purchase was made, and the title to the lands had become vested in the defendant Elizabeth. That though the whole amount of $300, with the interest thereon, is still due to the plaintiffs from the defendants, they refuse to secure the plaintiffs therefor. The relief demanded is that the defendants may be compelled to execute to the plaintiffs a lien upon the lands described, by mortgage or otherwise, to secure the loan with interest; or that the plaintiffs may have such other or further relief, as the court may deem proper in the premises.

The defendants in their answer, denied that they had agreed to secure the loan by a lien upon the land, or that the plaintiffs had made the loan upon any such promise; and denied also that the loan was made on the credit of the defendants, and set up that it was made to and for the benefit of one David Marquat. The plaintiffs in their reply reaffirmed that the loan was made to the defendants and not to said David Marquat.

The cause was tried without a jury, at the Ulster circuit, in December 1851, before Mr. Justice PARKER, who decided that the plaintiffs had no equitable lien on the premises, and were not entitled to enforce the execution of a mortgage by the defendants; but that the plaintiffs were entitled to a judgment against the defendant Peter Marquat, for the $300, and the interest thereon; and that as to the other defendant, the complaint should be dismissed without costs.

The following is an extract from the opinion delivered by Justice PARKER, at the circuit:

"This is not a case in which the plaintiffs have an equitable lien for the purchase money; such lien exists only as between vendor and vendee, or those representing them; such, for example, as the personal representatives of the vendor; or where a third person interested in a claim against the personal estate of the vendee, by way of marshalling assets, compels the vendor to enforce his lien on the land, instead of obtaining payment out of the personal assets of the vendee. Here the plaintiffs were not the vendors of the land to the defendants. The mere fact that they furnished the money to make the purchase, gives them no equitable lien (2 *Story Eq. Jur.* § 12, 27, *et seq. and cases there cited*).

But it is shown that there was an agreement on the part of Peter Marquat to execute to the plaintiffs a mortgage on the lands. This agreement, if valid, would give the plaintiffs a remedy only against Peter Marquat, who could mortgage no more than his life interest in the premises. His wife being a *feme covert*, could make no contract to bind herself personally. But the agreement to execute a mortgage was void by the statute of frauds. It was an agreement to convey an interest in lands, that, to be valid, should have been in writing and not by parol (2 *R. S.* 3*d ed.* 194, § 6, 8).

If the title deeds of defendants had been actually deposited with the plaintiffs as security for the money advanced, it would be held to be an equitable mortgage and not within the operation of the statute of frauds (2 *Story Eq. Jur.* § 10, 20); but even that doctrine has been very much questioned (17 *Vesey*, 231; 2 *Ves. & Bea.* 84; 17 *Ves.* 371: 19 *Ves.* 480); and the courts have uniformly said they can go no further; and where the deeds are delivered, not as a pledge but for the purpose of having a legal mortgage prepared, there would be no lien, and the case would be within the statute (2 *Story Eq. Jur.* § 10, 20; 9 *Ves.* 115; 12 *Ves.* 199; 2 *Cox*, 247; *Turner*, 280; 6 *Price*, 501; 3 *Brown*, 401).

Advancing the money on the part of the plaintiffs, was not such a part performance as would take the case out of the statute (2 *Story Eq.* § 760). It only entitles the plaintiffs to recover it back—the agreement being void. Such relief only are the plaintiffs entitled to on the facts alleged and proved in this case.

The plaintiffs must have judgment against Peter Marquat for $300, and interest from 30th April 1849; and as to his wife, the complaint must be dismissed. But considering the part she has taken in the transaction, and what she is proven to have said in regard to it, she must not recover costs against the plaintiffs."

Judgment having been perfected upon the judgment thus rendered, the defendant, Peter Marquat, appealed to the general term.

JOHN VAN BUREN, *of Kingston, for Plaintiffs.*
J. O. LINDERMAN, *for Defendants.*

By the Court, HARRIS, Justice.—The complaint, so far as it states a cause of action at all, states matters of exclusive equitable

cognizance. The plaintiffs allege that the defendants had agreed to execute a mortgage to secure a loan of money, and having refused to do so, they bring their action to compel them to perform their agreement. There is some evidence to show that Peter Marquat did promise to execute such a mortgage, but there was no valid agreement to that effect. The plaintiffs have therefore failed to sustain their action according to the allegations in their complaint, and, of course, they are not entitled to the specific relief demanded. The question now is, whether they can, in this action, recover judgment against one of the defendants for the money loaned?

The 275th section of the Code authorizes the court in any case in which the defendant has answered, to grant any relief consistent with the case made by the complaint and embraced within the issue. In other words, the judgment must be *secundum allegata et probata.* It must be appropriate to the facts alleged and proved. Here the case made by the complaint is that the defendants had agreed to secure the plaintiffs for their loan by a lien upon certain premises, and had unjustly refused to keep the agreement. This is controverted by the defendants. No other material isssue has been made. Whether or not the plaintiffs, when they brought their action, were entitled to a repayment of their loan is not stated. The recovery of the money due them is no part of the claim made in their complaint. It is not embraced in the issue.

The defendants have successfully resisted the claim against them, as it is stated in the complaint. The only material issue in the case is decided in their favor, and yet judgment is rendered against one of them for a cause of action, which if it had been set forth in connexion with that stated in the complaint, would have rendered the complaint demurrable. The cause of action stated in the complaint is against both defendants, and that upon which the recovery has been had is against one only. Nor does it meet this difficulty to say that the cause of action upon which the plaintiffs have been allowed to recover, is involved in the case stated in the complaint. Suppose an action in the nature of replevin brought by the vendor of goods, on the ground that they have been fraudulently obtained, would it be pretended that

if upon the allegation of fraud being controverted he should fail in sustaining his action, he could still recover for the price of the goods? Or, suppose he should bring his action against the vendee, alleging false representations, and fraudulent devices in making the purchase, as in Field agt. Morse (7 *How. Pr. R.* 12), would he be entitled to a judgment for his debt, though he failed upon the issues he had tendered by his complaint? The effect in such case would be, what it has been in this, that the successful party would be charged with the costs of the litigation. The party who has prevailed upon the whole issue has judgment rendered against him. Whatever else may be charged to the account of the *reformed practice*, it is not justly chargeable with such injustice. If the plaintiffs had brought their action against Peter Marquat alone, to recover their debt, it may be presumed that, if he justly owed them, he would not have defended the action. If he had defended it without success, he would have been justly chargeable with the costs of the litigation. The plaintiffs have, in fact, brought their action for a very different purpose. That action has been successfully defended, and yet the plaintiffs have recovered not only the amount of their loan with interest, but the costs of their unsuccessful litigation. Thus, though defeated, they have triumphed.

I admit that from the facts as they appear in the case, there is some reason to apprehend that the plaintiffs, after having assisted the defendants to secure the title to their property, are not likely to be well requited for their friendly aid. I would willingly, therefore, if it could be done upon any sound principles, relieve them from the payment of the costs of the action. But wholly misconceiving their remedy, they have brought their action upon a claim which they could not sustain. They have entirely failed upon the issue whichy the themselves chose to make, and they must share the fate of other unsuccessful litigants. I think the judgment should be reversed and that the complaint should be dismissed with costs.

WRIGHT, J., concurred.

PARKER, P. J., dissented, and delivered the following opinion: It was adjudged at the special term, that the plaintiffs had no equitable lien on the land purchased with the $300 advanced by

them to the defendants, the title of which was taken in the name of the defendant Elizabeth. The reasons assigned were that a parol agreement to execute a mortgage is void by the statute of frauds; and that the wife, being a *feme covert*, could make no contract to bind herself personally. It was also held that, in general, an equitable lien exists only as between vendor and vendee, and does not extend to a person advancing money for the purchase of land.

So far, there is no difference of opinion as to the correctness of the decision; but it is supposed that the court below erred in giving judgment in favor of the plaintiffs against Peter Marquat, for the money so lent; and the important fact that such indebtedness was put in issue by the pleadings and proved upon the trial, seem to have been entirely overlooked by those who differ with me in opinion.

The question whether the complaint should have been dismissed because the plaintiffs failed to establish their equitable lien, which was the more important object of the action, or whether such other judgment as the party was justly entitled to, should have been rendered, is one of great practical importance, in administering justice under our present system.

It is certainly desirable, when all the facts and all the necessary parties are before the court, that justice should be administered on all the matters in controversy according to the established rights of the parties, whether they are legal or equitable. It was to effect that object, that legal and equitable powers were vested in the same tribunal, to be exercised at the same time, and under the same forms and rules of proceeding. With that object in view, more prominently than any other, was our present system of practice devised. But if, after all, a party is to be denied what is called legal relief because he specifically asked equitable relief, in a case where the pleadings, as in this case, allege the indebtedness, and where the proof clearly establishes it; and if, under such circumstances, a party is to be turned out of court and put to a second action, we have not yet made one step of progress in effecting the desired reform. A party might as well, under the late system, be turned out of one court and sent to another for relief, as under the present system to be turned out

of court, only that he might enter the same tribunal again in quest of justice. In either case, the party entitled to relief is equally subjected to the expense and delay of two actions instead of one; the very evil that it has been intended, by our recent constitutional and legislative enactments, to obviate.

In my judgment, a careful examination of the provisions of the Code, and a reasonable and proper application of them, will show that the efforts to effect this most desirable reform have not failed of their object.

The Code provides (§ 275) that the relief granted to the plaintiff, if there be no answer, can not exceed that which he shall have demanded in the complaint. This was wisely provided to protect a defendant who, on examining the complaint and ascertaining the precise extent of the relief claimed, preferred to admit its justice, by suffering judgment to be taken against him by default. But this is the only case in which the demand for relief made in the complaint has any influence whatever on the relief adjudged. For the same section proceeds to enact that "in any other case, the court may grant him (the plaintiff) *any* relief consistent with the case made by the complaint and embraced within the issue." In all actions, therefore, which are defended, it is of no consequence what is the demand for relief in the complaint, or whether there is any demand for specific relief. Whether the plaintiff has mistaken the kind of relief to which he is entitled, is entirely immaterial. "Any relief may be given, consistent with the case made by the complaint and embraced within the issue." More comprehensive language could not have been employed, and it will hardly answer to say that "any relief" does not include both legal and equitable, as they are usually called. I think the case of Cahoon and others agt. The Bank of Utica, decided by the Court of Appeals since the argument of this cause (*ante page* 401), establishes the doctrine that a plaintiff may have both legal and equitable relief in the same action. Brown & Rossiter, copartners, were indebted to the Bank of Utica to the amount of $3000, for which the bank held their partnership notes. Brown assigned to the bank a mortgage, his private property, as security for the payment of the notes. The Bank collected the full amount of the mort-

gage, which paid the notes, leaving a surplus in money in possession of the bank. The plaintiffs, general assignees of Brown, filed their complaint against the bank, demanding the excess of money and a return of the notes. The defendant demurred on the ground that the plaintiffs could not have judgment for the excess in money and a return of the notes in one action, but it was held that the complaint was good.

The case before us, being one in which the defendants answered, is to be decided under the last clause of the section of the Code above quoted, and the plaintiffs are clearly entitled to legal instead of equitable relief, if such relief is consistent with the case made by the complaint and embraced within the issue. Let us see if such is the case. The legal relief is a judgment for money lent. Is it consistent with the case made by the complaint? Clearly so, because the complaint alleges the lending of $300 to the defendants. This indebtedness is the foundation of the claim. It is that sum of money which the plaintiffs are seeking to secure. They allege a lending on request; the law implies a promise to repay. It is true they aver more, viz., a promise to secure by mortgage; but the law adjudges that promise void. It is no objection that the plaintiffs allege too much. They must have judgment according to the allegations sustained.

Is it embraced within the issue? It seems to me this is equally clear. The plaintiffs allege the lending of $300 to the defendants. The defendants in their answer deny that the money was advanced to them, but say it was advanced by plaintiffs to and for the benefit of one David Marquat, a third person. The plaintiffs in their reply deny that the money was advanced for the benefit of David Marquat, and reassert the loaning to the defendants. The indebtedness of the defendants was, therfeore, directly in issue.

This indebtedness thus put in issue, was established by the evidence; and I can see no possible reason why the plaintiffs are not entitled to judgment upon it. Not against the wife, who was legally incompetent to contract, but against the husband, who alone was liable.

I have thus far examined this case without reference to the demand for relief actually made in the complaint, and have shown,

I think, conclusively, that the plaintiffs would be entitled to judgment for the money, though the demand for relief had been only for a specific performance of the agreement to mortgage. But the demand for relief was as follows: "Therefore these plaintiffs demand the judgment of this court, that the said defendants execute to these plaintiffs a lien upon the aforesaid lands by mortgage *or otherwise*, to secure the said sum of three hundred dollars and interest from the 30th day of April 1849; *and for such other or further relief* as the court may deem proper in the premises, &c." It appears, therefore, that the plaintiffs asked a lien "otherwise" than by mortgage, and sought, generally, "other or further relief." Even under the late chancery practice, with such a prayer for relief, the plaintiff would have been entitled to any relief consistent with the case made by the bill and the prayer for specific relief, though different from the specific relief prayed for (Colton vs. Ross, 2 *Paige*, 296); and though a prayer for specific relief was usually inserted for greater caution, and as a matter of convenience, it was not absolutely essential to the validity of the bill; as under the prayer for general relief, the complainant might claim at the hearing, particular relief (2 *Barb. Ch. Pr.* 37). When it was doubtful what relief the plaintiff might be entitled to, the bill could be framed with a double aspect with an alternative prayer for relief (2 *Paige*, 396), and where a bill was filed for a specific performance, if it appeared the party had put it out of his power to perform specifically, the bill was retained and an equivalent in damages awarded (Woodcock vs. Bennett, 1 *Cow.* 711). Nor was a defendant permitted to set up at the hearing that the plaintiff had a remedy at law, unless he had demurred or taken the objection in his answer (Underhill vs. Van Cortlandt, 2 *John. Ch. R.* 369). Where a court of equity obtained jurisdiction of a cause for one purpose, it might retain it generally (Rathbone vs. Warren, 10 *John. R.* 587).

I have thus referred to the practice of the late court of chancery to show that even there it was attempted in similar cases, as far as the jurisdiction of the court would permit, to administer justice to the parties when once before them; and it was only for want of jurisdiction that a bill was dismissed and the party

sent to a court of law for relief. That want of jurisdiction no longer exists; and I can not consent to a construction of the Code which will make the present practice less liberal than that which preceded it. If such is the result of our efforts to improve, that we have become more technical than ever in administering justice, that the substance is accounted of less importance than the shadow, and that indisputable legal rights are still to be measured by set phrases and rigid forms, then indeed, we have signally failed in effecting a reform, and the word is a mere mockery—*lucus a non lucendo.*

I can not agree to the conclusion that the defendants have successfully resisted the claim against them. On the contrary, though they succeed on the legal question in escaping from the agreement, which it is proved they both made, to execute a mortgage as security for the loan, they have failed entirely in the defence they set up, that the loan was made to a third person and not to them. And the indebtedness thus denied and established was the most material fact in issue, and was the foundation of the plaintiffs' claim.

It is said that the complaint would have been demurrable, if it had contained a demand for judgment upon the indebtedness against Peter Marquat alone, in case of a failure to compel both defendants to execute the mortgage. I can not agree to such a proposition. The only grounds of demurrer to a complaint are the six stated in section 144 of the Code, and none are applicable to such a case. The complaint would then, as now, present but one cause of action, leaving the nature of the relief to depend upon the proofs and the judgment of the court.

Nor is there any difficulty in giving judgment against Peter Marquat alone, where it is alleged and proved that the promise was made by him and his wife, and the action is brought against both. As she was under a personal disability, which rendered her incapable of making a valid promise, judgment may be given against the other defendant who was competent to contract. The Code (§ 274) authorizes judgment to be given for or against one or more of several plaintiffs and for or against one or more of several defendants. I do not go so far as two of my brethren did in The Mechanics' and Farmers' Bank vs. Rider

(5 *How. Pr. R.* 501), who held that in all cases a joint contract may now be severed by giving a judgment in favor of one plaintiff or defendant and against the other. But I hold, as I did in that case, and as has been since adjudged in Fullerton vs. Taylor (6 *How. Pr. R.* 259), that the object of that section of the Code was to enable the court to give judgment in all cases according to the contract, as it should turn out to be on the trial, regardless of the number of parties named on the record; and that, in no case can a joint contract be severed in giving a judgment, except where, as in this case, there was some personal disability or personal defence, such as discharge in bankruptcy, infancy, &c. If three persons are sued as partners, and it appears on the trial that the indebted firm is composed of but two of the defendants, judgment may now, under the Code, be rendered against the two and in favor of the other defendant. It was the object of the section in question to obviate the necessity which existed under our late practice, of giving judgment in such cases in favor of all the defendants, and putting the plaintiff to a new suit against the two partners only. In this case, both defendants are alleged to be indebted; but as one of them is a *feme covert*, against whom the plaintiffs can not have judgment in consequence of her legal disability, although she had the whole benefit of the money loaned, by buying land with it in her own name, the plaintiffs are entitled to judgment against the husband alone. In law, he alone made the promise.

This is not at all like the case to which it was likened by counsel, of an action in the nature of replevin brought by the vendor of goods, on the ground that they had been fraudulently obtained, and upon failing to establish the fraud claiming to recover the price of the goods. There the two claims would be inconsistent; one would affirm and the other would disaffirm the contract. Here both claims are in affirmance of the contract. If the plaintiffs fail in their claim to compel the executing of the mortgage, it is entirely consistent in them to claim judgment for the amount of the loan. In both cases the loan is affirmed, the contract is insisted upon, and the object is security for the debt. It is no objection to the plaintiffs recovery that they have not succeeded in all they claimed. If they had claimed to recover

the value of several articles of property sold, worth in the aggregate one thousand dollars, and on the trial had succeeded in proving only a single article delivered, worth but one hundred dollars, it will not be pretended that the plaintiffs would not be entitled to judgment for the one hundred dollars, though the defendants had succeeded as to nine-tenths of the matters in controversy. The same principle applies to the case before us. In the case I have supposed, the action being to recover money only, the plaintiffs would recover costs; but in the case we are deciding, costs are in the discretion of the court (*Code*, § 306); and it certainly is a question whether the plaintiffs, having failed in one leading object of the action, ought to recover costs. But the fact that they have so failed is no reason why they should not have judgment for what they have succeeded in establishing.

It was said upon the argument, that in a separate action to be brought to recover the money lent, the defendant might allege a set off, or set up some other defence. The obvious and conclusive answer to that argument is that he might set up any such defence in this action. As the indebtedness was the foundation of the action, so any defence to such indebtedness was a full defence to the action. If the defendant could set up usury, or payment, or establish a set off, or in any way defeat the claim of indebtedness, the plaintiffs could have no right to either a mortgage or a judgment. And this the defendants perfectly well understood when they denied the indebtedness and answered that the credit was given to David Marquat and not to them. Having defended on that ground and having failed in that defence, they ought not to have an opportunity to litigate the question of indebtedness again; nor is it pretended, in fact, that any other defence exists beyond the question already litigated.

The whole case grows out of a single transaction. The facts not admitted in the pleadings have been established by proof. Both claims to relief are in affirmance of the contract. All the parties interested are before the court, and I think such judgment ought to be given as the plaintiffs are entitled to, without subjecting them to the expense and delay of a second action.

I have examined this case at considerable length, with a view to bring the questions involved before my brethren on the bench

for their consideration. Upon the spirit with which the judges second the efforts of the legislature to effect a much desired reform, must depend, in a great measure, its success. Judicial construction may do much toward sustaining or defeating a new, and, in some respects, necessarily crude system of procedure. With the aid and cooperation of the judiciary, and with such legislative amendments as experience may suggest, we may reasonably hope, in due time, to enjoy the benefits of a system of practice, under which justice may be administered in the simplest form, and with the least possible expense and delay. This can never be accomplished until the forms of pleading and proceeding are the same, whether the relief sought be legal or equitable. Nor can it be accomplished, until the court has the power and shall be required, in all cases, to render final judgment upon all the material facts in controversy, which are covered by the issues and established by proof; giving to the party either legal or equitable relief, or both, whenever all the parties to be affected by the judgment are before the court.

If this can not now be done, then further legislation is imperatively demanded. But believing that the powers of this court are now ample for such purpose, I think the judgment rendered at special term should be affirmed.

SUPREME COURT.

Salinger agt. Lusk.

An *answer* (verified) in slander which merely states that the defendant did not utter precise words, at the precise time, *and* in the particular place *and* manner stated in the complaint, is simply swearing that the complaint is not *all* true. How much of it is true it does not admit nor deny. It may, therefore, without being literally false, leave a good cause of action undenied. It is not equivalent to the general issue as formerly understood. It is *insufficient* as containing a negative pregnant, and not controverting the allegations of the complaint separately and substantially.

Where the plaintiff requires a verification he is entitled to have the answer drawn with legal certainty and precision. The defendant must meet the *substance and import*, not the letters and figures of the complaint. Any other construction would result in a virtual repeal of the Code so far as it authorizes a *verification*.

It seems, that under the present Code, allowing the principle of general denial, the courts might sanction the *old form of pleading the general issue*.

But how is such an insufficient answer now to be disposed of? *Held*, that the true construction, grammatical as well as legal, of § 153, gives a *demurrer* to an answer in all cases of *insufficiency*, whether it appears in a *denial* or in *new matter*. (*The cases upon this point reviewed and the question fully discussed.*)

Brooklyn Special Term, January 1853. The complaint sets forth several sets of slanderous words, which it alleges defendant uttered and published of and concerning the plaintiff. The answer denies the allegation contained in the complaint, that on or about the fourth day of May last, in the city of Williamsburgh in the county of Kings, he, the defendant, did speak, utter and publish, of and concerning the plaintiff, in a public manner, *and* in the presence and hearing of divers persons, the following false, malicious and defamatory words, to wit: "that (meaning the plaintiff) is Salinger." "He (meaning plaintiff) has stolen the horse (meaning a certain horse then had in his possession) arrest him." "That's Salinger, he has stolen the horse; he has stolen that horse; arrest him you" (meaning a certain officer addressed) "better arrest him." The pleadings are verified.

To this answer the plaintiff demurs.

E. D. Culver, *for Plaintiff.*

H. D. Birdsall, *for Defendant.*

BARCULO, Justice.—That this answer, upon general principles of pleading, is clearly bad, can not be doubted. It simply states that the defendant did not utter the precise words, at the precise time, and in the particular place and manner stated in the complaint. How much of the plaintiff's complaint is true, the defendant does not admit nor deny. He simply swears that it is not *all* true. This answer may, therefore, without being literally false, leave a good cause of action undenied. If we tolerate this mode of pleading, we abolish the substantial benefits of a verification. For if three-fourths of this answer should prove to be false, and the other one-fourth true, no legal perjury could have been committed.

If the answer had not been verified, I should have been disposed to let it stand, as equivalent to the general issue or general denial, within the decision of Kellogg agt. Church (4 *How. Pr. R.* 339). By that mode substantial justice could be done; for if the plaintiff does not require the oath, the defendant has a right to deny the whole demand or charge in general terms, whether it is true or not, and put the plaintiff to his proof. But where the plaintiff requires a verification, he is entitled to have the answer drawn with legal certainty and precision, so that the defendant's conscience may be brought in direct contact with every material part. The defendant must meet the substance and import, not the letters and figures, of the complaint. Any other construction would result in a virtual repeal of the Code, so far as it authorizes a verification.

But lest I should be misunderstood, I will add in this connection that I do not, by any means, consider this answer equal nor equivalent to the general issue as it was formerly understood. That plea put in issue all the material facts in the declaration. Although in its terms it said, the defendant "is not guilty of the said supposed grievances above laid to his charge, or any, or either of them, or any part thereof in manner and form as the plaintiff hath above thereof complained against him;" it was construed not merely to deny the actual *form and manner* of the charge, but to controvert the *substance* of every cause of action contained in the declaration. As applied to the case before us, that plea would put in issue the uttering of each set of slander-

ous words, not only at the time and place and under the circumstance detailed in the complaint, but at *any* time or *place*, or under *any* circumstances which would render them actionable. For, as time and place and presence are not material, the plea of the general issue, being founded on common sense, looks beyond these matters and controverts only the substantial allegations of the plaintiff. If the defendant had answered in the terms of the old general issue, and sworn to the truth of the answer, he would have sworn, in substance, that it was not true that he ever uttered either set of slanderous words charged in the complaint. But as it is, he has sworn only that he is not guilty of all that is alleged under the particular circumstance named in the complaint, leaving it very possible, that he is guilty under circumstances slightly and immaterially variant.

The wit of man has never yet devised, and it may well be doubted whether the present generation, with all its labors will ever bring forth, any formula equal to the old general issue, for the purposes of a general denial. It united the great elements of all good pleading, brevity, simplicity and comprehensiveness. And if the principle of general denial is to be reinstated, of which we have all the encouragement derivable from the fact that it has stood firmly as the law of the land, since the sixth day of May last, notwithstanding its previous unsteadiness, I see no reason why the courts should not sanction the old form of pleading the general issue, and thus put an end to this vexatious and useless course of litigation.

II. The more difficult question, however, relates to the proper mode of disposing of such an insufficient answer. It is contended that a demurrer will not lie; and this argument is rendered plausible by the latter alteration in the Code, and by at least one express adjudication (Thomas agt. Harrop 7 *How. Pr. R.* 57). I had occasion to pass upon this question, under one of the former phases of the Code, in the case of Hopkins agt. Everett (6 *How. Pr. R.* 159). It was there held that a demurrer would lie to a *denial* in an answer for defects similar to those appearing in the present case. That construction of the Code was affirmed by the general term of this district on appeal. But since that, the section bearing upon this question has been considerably modified,

and the alteration would seem to indicate an intention to avoid or annul our former decision.

I am, however, still inclined to the opinion, after a careful consideration of the subject, that, although it may have been and probably was otherwise intended, the true construction, grammatical as well as legal, of section 153, gives a demurrer to an answer in all cases of *insufficiency*, whether it appears in a denial or in new matter. (§ 153.) "When the answer contains new matter constituting a counter claim, the plaintiff may, within twenty days, reply to such new matter, denying generally or specifically each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege in ordinary and concise language, without repetition, any new matter, not inconsistent with the complaint, constituting a defence to such new matter in the answer; or he may demur to the same for insufficiency, stating in his demurrer the grounds thereof; and the plaintiff may demur to one or more of several counter claims set up in the answer, and reply to the residue."

It declares, as I understand it, that when an answer sets up a counter claim, the plaintiff may reply; and that he may demur to the answer for insufficiency. It will be observed that the chapter is headed "The Reply," and that the section begins with the words "When the answer," &c., and, after providing for a reply to all counter claims, that clause of the sentence is terminated by a semicolon; and this clause next follows: "or he may demur to the *same* for insufficiency, stating in his demurrer the grounds thereof."

Now I suppose that, according to the principles that connect adjectives with their antecedents, which principles, as they have not undergone the process of codification, retain some degree of permanency, the word 'same' must refer to the word 'answer,' which preceded it.

2. It seems to me too that, in a legal sense, the section would speak more correctly and intelligibly, if it should be deemed to speak of a demurrer to an answer, rather than of a demurrer to new matter, or to a counter claim. We perceive the appropriateness of language, when it applies a demurrer to a *pleading*,

but not so, when it applies it to certain matters which may be contained in a pleading.

3. There is just as much reason for allowing a demurrer to an answer which does not contain new matter, as there is for allowing it to a reply. Section 155 provides "if a reply of the plaintiff to any defence set up by the answer of the defendant be insufficient, the defendant may demur thereto, and shall state the grounds thereof." This clearly does not restrict the defendant to the insufficiency of *new matter*, but gives him full liberty to demur to the reply in all cases of insufficiency.

But perhaps it may be contended that insufficiency can only exist in the mode of setting up new matter. To this it may be replied that it is contrary to *reason* and *authority*.

Upon what principle can we refuse a demurrer to either party who claims that his adversary has imperfectly controverted or answered his prior pleading? Why should we send the parties with their witnesses to the circuit to try an immaterial issue? Certainly there is no good reason for it. On the contrary, it is sound policy, in my judgment, to keep causes away from the circuit until a material issue of fact is joined, and whenever a demurrer tends to narrow down the issues, and bring the pleadings into proper shape, it is the safest and best means of attaining the truth and justice of the case. We must bear it in mind, that all the forms of pleading are devised for the purpose of ascertaining the rights of the parties, with reference to the administration of exact justice, and all the rules we adopt calculated to defeat that end, are, to that extent, a direct perversion of the powers of the court, and a violation of the first principles of the law.

What better mode than demurrer have we to reach defects in a pleading. Take the case before us as an illustration. The answer is not a sham, to be stricken out under section 152; nor is it frivolous, so as to fall within section 247. It is an answer which aims at a material defence, but the defence is imperfectly stated. What shall we do with it? Shall we say it comes within section 168 and does not *controvert* the complaint, and permit the plaintiff to take judgment? If so, we may do great injustice, by cutting off a meritorious defence, because of a

mere defect in the phraseology of the answer. Is it not better to entertain the objection on demurrer, and give the party leave to amend, by making that certain which is now uncertain? I conceive this to be the only remedy that reaches the evil. It is not a case that can be disregarded as an immaterial variance at the trial; nor does it fall under any of the sections in regard to amendments which can be made at or after the trial. It is possible, perhaps, that the defect might be reached under section 160, by ordering an amendment to make it more "definite and certain." But that remedy is somewhat doubtful, and there is quite as much reason for supposing that that section refers to new matter, as that section 153 does. Besides, we are not told how the question is to be presented to the court under section 160. All we learn is that "when the allegations of a pleading are so indefinite or uncertain, that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain, by amendment." Why may not this be done on demurrer? It is the old legitimate office of that pleading. There is nothing in the Code to prevent this course being adopted. It is for the courts to determine what is the most convenient and suitable mode of raising the question.

We have yet to look into the authorities, to see what meaning is attached to *insufficiency* in a pleading; and especially to ascertain whether it is or not peculiarly applicable to the statement of new matter.

In common law pleadings the word was sometimes used. A pleading was said to be defective, uncertain, or bad, but it was not generally called insufficient. In chancery, however, the word was extensively used, in connection with answers which were called insufficient, when they did not distinctly and fully respond to the allegations or interrogatories in the bill. But it was always applied to those answers which did not explicitly respond, either by admitting or denying specifically, the matters charged or inquired of by the complainant, and was not deemed applicable to the statement of *new matter* (1 *Hoff. Ch. Pr.* 272; 1 *Paige*, 556).

In the last of these cases, Chancellor WALWORTH says: "The part of the answer to which these exceptions are taken is in no

way responsive to the bill, and was not called for by the complaint. It relates to a distinct claim set up on the part of the defendant by way of set off. *If the defendant sets up a distinct matter by way of avoidance, and which is not called for by the bill, the answer can not be excepted to for insufficiency.*" The rule is further illustrated by the case of Davis vs. Mapes (2 *Paige*, 106). The bill charged that William Coffin, the executor, continued after the issuing of a fi. fa. and until the 5th of September, to sell and dispose of the said goods and merchandise, *and* to appropriate the proceeds thereof, without any hindrance on the part of the said James Mapes, or of the said sheriff, and without accounting for the same to said Mapes or the said sheriff, but applying the same, or a part thereof, to the support of the said Coffin. The defendant answered that "he denied that the said Coffin continued after the issuing the said fi. fa., and until the said 5th day of September, to sell and dispose of the said goods and merchandise, and to appropriate the proceeds thereof, without hindrance on the part of the defendant, or the said sheriff; but, on the contrary, applying the same goods and merchandise to the maintenance of the said Coffin." This part of the answer was excepted to for *insufficiency*. Upon this the chancellor thus speaks: "The fifth exception is also well taken. In this case the defendant has answered literally as to a charge in the bill, laid to be done with divers circumstances. He should have answered explicitly each distinct part of the charge; as whether Coffin did at any time, and if at any, at what time between the issuing of the execution and the fire, sell the goods levied on, or any part thereof; and if any, what part; and whether the defendant or the sheriff had knowledge of the fact, and permitted him to do so, or attempted to hinder him. And if he sold any goods, whether he accounted with, and paid over to the sheriff or to the defendant Mapes, the proceeds thereof, or otherwise. The answer as it now stands is a negative pregnant, and the material part of the charge may be true. As a general rule, when the charge in the bill embraces several particulars, the answer should be in the disjunctive, denying each particular, or admitting some and denying the others, according to the fact" (*vide* 1 *Hoff. Ch. Pr.* 271). That case contains the whole doc-

trine on the subject. I regard it as an unanswerable authority, to establish the proposition that *insufficiency* may be *properly* if not exclusively, predicated, of an answer which merely *responds* to a complaint, whether by *admission* or *denial* without containing any counter claim, or any other novelty. I deem it also an authority, if any were needed, to show that the answer under consideration is insufficient, as containing a negative pregnant, and not controverting the allegations of the complaint separately, and substantially.

If, therefore, the term "insufficiency" had a fixed and definite meaning under the old chancery system, and was applicable peculiarly to a defective denial in an answer, what right have we now to say, that its meaning has been wholly changed, and that it refers only to new matter, or a counter claim? I am not aware of any legislative enactment which has done this violence to an old familiar term; nor do I think it has been transformed by implication, if that were possible. We should rather infer the contrary, from the circumstance that an attempt has been made to ingraft upon common law proceedings the principles and names of equity pleadings.

We must, therefore, assume according to established rules of construction, that the authors of the Code, understood that this term had a settled meaning, as has been shown; and that they employed it, in relation to an answer, to express defects of the character which had hitherto been known to the law as insufficiencies, and that they substituted demurrers instead of exceptions, as a more convenient mode of reforming such objectionable pleadings. It is not designed to say that demurrers are *confined* to denials. On the contrary, it is supposed that a demurrer is the proper mode of objecting to any entire defence, whether composed of new matters, counter claims, or mere denials, which not being liable to the charge of sham, or frivolous, are, nevertheless, so imperfectly stated as not to present a distinct, material issue. A demurrer to a reply stands upon the same foundations.

There is another view of the subject which has strongly and repeatedly suggested itself, during the examination of this case. The power to entertain a demurrer as a means of testing the

legal sufficiency of a pleading, is a common law power appertaining to this court, of which it can only be deprived by express legislation. Now the Code does not take away this authority, nor is there any thing in the Code inconsistent with its exercise. It is, of course, limited to those cases, which, according to the Code, may be deemed bad pleading. Within such limits, however, no good reason appears, why it may not be employed. If, for instance, that provision which requires the defendant to answer by "a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief," be violated, why may not the defect be reached by a demurrer? Is it said that other remedies are provided? To this I answer *first*, that the fact that some defects may be reached by motion to strike out as frivolous, sham, &c., is no reason why we should deem demurrers abolished by implication. For these same motions, or some of them, were coexistent with demurrers long before the present system was thought of. *Secondly*, there are many defects to which none of these motions can be properly applied. It can be easily proved, from the reported adjudications, that this plaintiff could not get rid of this answer by either of the summary modes pointed out by the Code. If he moved to strike out the answer as a sham, he would be told that it could not be done, because it did not appear to be clearly *false*, as was done in Nichols agt. Jones (6 *How. Pr. R.* 357), and in Seward agt. Miller (6 *id.* 312). If he claimed that it was frivolous, he would be met with the case of Temple agt. Murrray (6 *id.* 329), where it is said that "in case of doubt, the court will not adopt the stringent and summary mode of giving judgment by striking out a plea as frivolous," and numerous other cases where it is declared that the frivolousness must be plain and palpable, so as not to admit of doubt or argument; or he may encounter the case of Darrow vs. Miller (3 *Code R.* 241), where it was held that an answer could not be struck out as frivolous, unless it was also a "sham pleading;" or the court may tell him as they did in Scovell vs. Howell (2 *Code R.* 33), that the answer was *insufficient*, and "if the plaintiff had demurred, he undoubtedly would have succeeded; but he has mistaken his remedy."

It is clear that an answer of this kind can not be got rid of except by demurrer. If that will not lie, the parties must go to the circuit and dispose of the issue as well as they can.

Demurrers are retained by the Code as a part of the system of pleading. It provides that parties may demur under certain circumstances; but it does not *forbid* a demurrer under other circumstances. The original Code of 1848, did provide, as I understand it, by section 132, that a demurrer would only lie to a complaint, but that section is repealed.

The superiority of a demurrer to the other modes of disposing of a pleading of this character, is obvious. The proceedings on demurrer are well understood; a decision is a *judgment* from which *either* party can appeal. On motion to strike out, the practice is unsettled and difficult; the decision in some cases is deemed an *order*, and in others a *judgment*; the right of appeal is uncertain, and in many cases denied, to at least one of the parties (Bedell agt. Stickles, 4 *How. Pr. R.* 432). Moreover, under our system of holding special terms every month, a cause can be heard with the same convenience and dispatch on demurrer as it can be on motion. I am satisfied that this is a case where, in the language of Justice CRIPPEN, "the safer rule is to stand by the land marks of the common law, and protect them against crude and hasty legislation" (7 *Howard's Pr. R.* 281).

I am aware that it is stated in some of the books on practice, that it has been said by some of the judges of the Superior Court of the city of New York—and that it has in one instance been expressly decided by a justice of this court, that the plaintiff can not demur to an answer, unless it sets up a *counter claim* (Thomas agt. Plumb, 7 *How. Pr. R.* 57). The reason given in that case is in these words: "The 153d section of the Code settles this question, and only allows the demurrer in the cases above stated." With the utmost respect for the learned court that made this decision, I must beg leave to submit in opposition thereto, the opinion that section 153 does *not* settle the question, as is there stated. Moreover, I do not understand the law to have been, that an answer of the kind found in that case, was not demurrable at common law. On the contrary the books are full of cases

of demurrers to a plea for the reason that it *amounted* to the *general issue* without being in the established form.

But let us glance a moment at the consequences of such a sweeping rule. It is to be remembered, that if the construction claimed for section 153; in the case of Thomas agt. Plumb, is correct, no demurrer can be interposed to a denial, nor to *any new matter*, unless it constitutes a *counter claim*. Hence, if a defendant pleads payment, infancy, coverture, usury, duress, release, bankrupt's discharge, or any defence which goes merely to discharge the cause of action, the answer will not be demurrable, no matter how great or how slight the defects may be. If in setting up the statute of limitations the attorney happens to plead *non assumpsit infra sex annos*, where he should have pleaded *actio non accrevit*, &c., he is not to be put right by a demurrer, but he is to have judgment against him for pleading frivolously, or else the answer is to stand as forming a good issue.

It will be seen, however, by looking over our reports, that in *practice* we are constantly allowing demurrers to denials, or to matters which do not constitute a counter claim. The last case that I decided was one of demurrer to a denial in which no question was raised as to the correctness of the practice. I allude to Dimon vs. Bridges. I find two cases in No. 4 of the 7th of *Howard*, which have come to hand since the former part of this opinion was written. In the case of Bogardus the elder agt. Parker (7 *How. Pr. R.* 303), Justice MITCHELL allowed a demurrer to an answer which did not set up a counter claim, although it set up new matter. In Noxon agt. Bentley (7 *How. Pr. R.* 316), Justice HAND allowed a demurrer to an answer which did not set up any new facts, certainly not a counter claim. In Seward agt. Miller (6 *How. Pr. R.* 312), the answer was a mere *general denial*. Justice S. B. STRONG held that it should have contained a *specific* denial, and therefore it was *insufficient*. He held further that the answer could not be stricken out as sham, irrelevant or frivolous; and gave the *plaintiff leave to demur*. He closes his opinion with the following just remarks: "But in all cases of doubt, or where the insufficiency is from any other cause, the party objecting to it should resort to a demurrer, when

the point may be more deliberately considered and satisfactorily settled."

I am indeed consoled by the reflection, that, if I err in this matter, I am but following in the wake of these eminent and venerable jurists. In these revolutionary times, they naturally adhere to the great principles of good pleading, as the tempest-tossed mariners cling instinctively to the wreck of their dismasted ship, and when chart and compass have been swept away, still turn their eyes to the polar star, and struggle on through the darkness and gloom which is gathering around them.

Judgment for the plaintiff on demurrer, with leave to defendant to amend his answer on payment of costs.

SUPREME COURT.

PORTER AND OTHERS agt. THE PEOPLE EX REL. CASS.

In proceedings under the act relating to forcible entries and detainers, where the complaint sets out fully the forcible entry or the forcible holding out, and the estate and right of possession of the complainant, and is verified by affidavit, no other affidavit is necessary, and the complaint will be regarded both as a complaint and an affidavit.

On the trial of the traverse twelve jurors must be sworn. The judge has no right to proceed and try the traverse with six jurors.

The impannelling mentioned in § 9 of the act, refers to the panel to be made by the officer summoning the jury, and has no reference to any drawing or swearing the jury by the judge. If any of those summoned are found to be disqualified, the officers may be directed to summon others in their places until his panel contains twelve qualified jurors, and the whole are to be sworn

If the complainant is in the actual and peaceable possession, the traversers can not upon the trial controvert the complainant's right to continue his possession. It must be restored, notwithstanding his right to the possession has expired. The object of this statute was to prevent entries by force, and to insure a determination of controverted rights, by due course of law.

Seventh Judicial District General Term, December 1852. *Present,* WELLES, SELDEN and JOHNSON, *Justices.* This was a common law certiorari to review the proceedings and determination,

on the traverse of an inquisition found, in case of forcible entry and detainer before the county judge of Steuben county.

The complaint set out all the facts and was verified by affidavit, but there was no other affidavit than that verifying the complaint. The traverse was tried before the judge by six jurors drawn from the twelve summoned. There was some proof on the trial tending to show that the relator's interest in the premises, and his right to the possession had expired before the entry complained of. The judge charged the jury that if the relator was lawfully in the peaceable possession, he could not be turned out by force, and if he was so turned out, he was entitled to the benefit of the provisions of the statute, and to be restored to his possession, notwithstanding his right to the possession may have terminated by the agreement under which he held. The counsel for the plaintiffs in error excepted to the charge in this respect. He also upon the trial, in due time, objected to the right of the judge to proceed and try the traverse, on the ground that the statute requires that the rights of the complainant, and also the forcible entry, shall be stated in the affidavit accompanying the complaint; and also that there should be twelve jurors instead of six. The jury found a verdict in favor of the complainant.

E. G. LAPHAM, *for Plaintiffs in error.*

C. J. BASKIN, *for Defendants in error.*

By the Court, JOHNSON, Justice.—There is not a literal compliance with the statute in the complaint and affidavit. The statute requires that the complaint shall be in writing, and shall be accompanied by an affidavit of such forcible entry or forcible holding out, and that the complainant has an estate, &c., stating the same. This seems to contemplate that the forcible acts complained of, and the complainant's right shall be set out in full in the affidavit. There is no affidavit here except the one verifying the complaint. All the facts are, however, set out in the complaint, which the statute requires in the affidavit accompanying the complaint, and that is verified; so that the officer had every thing before him which the statute contemplates in one paper. I think this may be regarded as both a complaint and an affidavit; and that there has been a substantial compliance

with the statute in this respect though not in the exact form contemplated. I think the complaint and affidavit set out a right of possession in the complainant, and that the premises were sufficiently described. The objection taken and the exception to the decision of the judge as to the number of jurors to be sworn to try the traverse, seems to me one of a more serious character. Only six jurors, out of the twelve summoned, were sworn to try the traverse as jurors.

The statute (2 *R. S.* 509. § 8) requires the judge, upon traverse being made, to issue a precept to the sheriff or constable, commanding him to summon *twelve qualified jurors* to come before him at a time and place therein to be specified, "to try the same traverse." Section 9, provides that "the jurors shall be summoned, returned and impannelled in the same manner as provided by law in civil actions before justices of the peace, and shall be sworn by such judge," &c.

It is contended by the counsel for the defendant in error that, "impannelling in the same manner as provided by law in civil actions before justices of the peace," means drawing six from the list returned summoned, who are qualified to sit as jurors and swearing them as jurors to try the traverse.

This depends upon the legal signification of the term impannel. BOUVIER says, "to impannel, is to write the names of a jury on a schedule by the sheriff or other officer lawfully authorized," (1 *Bouv. Law Dict.* 652). "Panel, a schedule, or roll, containing the names of jurors summoned" (2 *Bouv.* 260, *tit. Panel*). Webster defines impannel, to mean "to write or enter the names of a jury in a list or piece of parchment called a panel, to form complete, or enrol a *list* of jurors in a court of justice." Thus it will be seen that the act of impanneling, has nothing to do with that of drawing, selecting, or swearing those who are to serve as jurors, but simply making the list of those who have been selected; and section 9 expressly provides for their being sworn after they shall have been empanneled.

On referring to the act relating to Justice's Courts, it will be seen that there is no impanneling provided for, but that made by the constable who summons the jury. The Revised Statutes (2 *R. S.* 243, § 98) provides that the constable to whom any

venire shall be delivered, shall "summon the jurors personally and shall make a list of the persons summoned, which he shall certify and annex to the venire and return to the justice."

The constable summons, impannels, certifies, annexes his list or panel to the venire, and returns it to the justice.

From this panel the justice draws six and swears them as the jury to try the cause. The justice has nothing to do with making the panel, except of those he has sworn after they are drawn, The names returned upon the panel are to be written upon separate slips of paper, and folded by the constable and placed in a box, and the justice then draws a certain number to be qualified to serve as jurors.

This reference to the manner of proceeding in Justices' Courts renders the provisions of § 9, before referred to, perfectly obvious.

The jurors are to be summoned, impanneled and returned by the sheriff or constable, who is to execute the precept fairly and impartially, and not to summon any one whom he has reason to believe biased or prejudiced for or against either of the parties according to § 98 of the justices' act, and they are to be sworn by the judge.

The act does not provide for drawing or swearing any less number than the whole panel who have been summoned and returned as in the case of proceedings before a justice "to try the same traverse," and of course the whole should be sworn.

Twelve are to be summoned to try the traverse, and the judge is to swear the jurors summoned, impanneled and returned. Consequently twelve are to be sworn, as no provision is made for any less number.

And this I think will be found to correspond with the uniform practice in cases of this kind. The error of the judge arose from confounding the duty of the constable in Justices' Courts in making, certifying and returning his panel with that of the justice in drawing the ballots, trying challenges, and swearing those drawn and found competent.

But the statute in these proceedings provides for no drawing. The whole panel are to be sworn. Should any be found not competent to sit, the officer might be directed to summon others till he should complete his panel of impartial and competent

jurors. The plaintiffs were entitled to have their traverse tried by twelve jurors, and the trial by six only, without their consent, was erroneous.

I am of the opinion that the charge of the judge to the jury was unexceptionable in all respects. On the trial of the traverse the complainant is only required to show in addition to the forcible entry or detainer, that he was peaceably in the actual possession at the time of the forcible entry. And the traverser can only show in his defence that he, or those under whom he claims, have been in quiet possession for the space of three whole years together next before the inquisition found, and that his interest is not then determined (§ 11).

The questions to be tried are the possession and the forcible character of obtaining or holding it. Not the question whether a party actually in peaceable possession and forcibly expelled, had the right to the possession. The very object of the statute was to secure and restore to persons forcibly ejected, their peaceable possession until the right should be determined by due course and process of law, and to punish the entry upon such a possession with strong hand and without legal process (The People vs. Read 11 *Wend.* 157). It was for the jury to determine from the evidence whether the entry was a mere trespass, or a forcible entry, and also whether possession was held by force, as the evidence was conflicting. The judgment must, however, be reversed.

SUPREME COURT.

SCHOOLCRAFT agt. THOMPSON.

SMITH AND OTHERS. agt. THOMPSON.

SMITH AND OTHERS agt. THOMPSON.

A statement in writing for the entry of a judgment, by confession, without action, under sections 382 and 383 of the Code, whereby the defendant confesses and authorizes a judgment for a certain sum, and then adds, "this confession of judgment is for a debt justly due to the plaintiff," without any thing further in regard to the amount due, is not a sufficient compliance with the requirement, that it "must show that the sum confessed therefor is justly due."

Nor is it a sufficient compliance with the requirement, that "it must state concisely the facts out of which it (the debt) arose," to set forth that it arose "upon the following facts, for goods, wares and merchandise sold and delivered to me by Messrs. S., R. & Co., Albany; of which firm the plaintiff is a member. The goods were purchased by me in the year 1851 and 1852, and this judgment is confessed to said plaintiff for the benefit of said firm."

Whether it is a sufficient verification of such statement, for the defendant to make affidavit "that the *facts* stated in the above *confession* are true," *Quere?*

A judgment entered upon such a statement and affidavit, will be regarded fraudulent and void, as to junior judgment creditors, and set aside to that extent on their application.

Livingston Special Term, February 1853. On the 24th of November 1852, a judgment by confession, without action, was entered in favor of Schoolcraft against Thompson upon a statement in writing and affidavit as follows:

"Supreme Court, County of Livingston: John L. Schoolcraft against Theodore Thompson. Statement and confession of judgment without action. I do hereby confess judgment in this cause in favor of John L. Schoolcraft for the sum of one thousand and twelve dollars and three cents ($1012·03), and authorize judgment to be entered therefor against me. This confession of judgment is for a debt justly due to the plaintiff, arising upon the following facts: for goods, wares and merchandise sold and delivered to me by Messrs. Schoolcraft, Raymond & Co., Albany, of which firm the plaintiff is a member; the goods were purchased

by me in the years 1851 and 1852, and this judgment is confessed to said plaintiff, for the benefit of said firm of Schoolcraft, Raymond & Co. (Signed) T. THOMPSON."

"County of Livingston: Theodore Thompson of Moscow, the defendant above named, being duly sworn, says, that the facts stated in the above confession are true, and further he says not."

(Signed) "T. THOMPSON."

Sworn to before me, this day of November 1852.

T. J. JONES, Justice of the Peace.

On the 7th day of December following, the plaintiffs in the last two actions, obtained judgments therein against Thompson, which on that day were duly docketed. They now move to set aside the first named judgment as fraudulent and void, as against their judgments, for defects in the statement and affidavit.

COLLINS & WILSON, *for Junior Creditors.*

CHAMBERLAIN & WO[illegible].

T. R. STRONG, Justice. By section 382 of the Code, it is provided that "a judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter." Section 383 provides that "a statement in writing must be made and signed by the defendant, and verified by his oath to the following effect: 1. It must state the amount for which judgment may be entered, and authorize the entry of judgment therefor. 2. If it be for money due or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed therefor is justly due or to become due."

The statement in question, is far short of a compliance with the last named subdivision. One important object of that subdivision was, that other persons than the parties to the judgment, having any interest, might, by referring to the statement, be informed of all the material facts in relation to the indebtedness, and thereby be better able to detect any fraud intended by the judgment. It was to protect third persons from fraud, by furnishing them to some extent with the means of discovering and preventing it. This object would be principally, if not whol-

defeated, if a statement like that in the present case should be allowed. No information is furnished of any considerable value. The defendant confesses and authorizes the entry of a judgment for a certain sum, and then says: "This confession of judgment is for a debt justly due to the plaintiff," without any thing further in respect to the amount due. It is contended by the counsel for the motion, that it is not even *stated*, by this expression, that the sum *confessed* is due; but that, perhaps, is too strict a construction. It was necessary, however, to go further, and "*show* that the sum confessed therefor is justly due," by setting forth circumstances from which it would be apparent. That would probably have been done sufficiently, by a proper compliance with the requirement to "state concisely the facts out of which it (the debt) arose." But the statement in that respect is also defective. It is that the indebtedness arose upon the following facts, "for goods, wares and merchandise, sold and delivered to me by Messrs. Schoolcraft, Raymond & Co., Albany; of which firm the plaintiff is a member. The goods were purchased by me in the years 1851 and 1852." This is much too general. The kind of goods, wares and merchandise," the quantities, the prices charged for them, the times, or near the times in the years named, when the purchases were made. None of these or any other particulars are stated, and no reason for the omission is given. I can not think the legislature contemplated, by the requirement that the facts be concisely stated, a statement so destitute of particulars, or that the requirement can be so easily satisfied. No essentially beneficial purpose would be answered by such a statement as to the nature, consideration and origin of the debt (Lawless vs. Hackett, 16 *John.* 149). The decision in that case was under a statute somewhat different in its phraseology from that of the provision of the Code applicable to this case; but it is not clear that it exacted a specification more full and precise than is now required (see also Brinkerhoff vs. Marvin, 5 *Johns. Chan.* 320, 325, 326).

It is urged also, in support of the motion, that the affidavit of verification is defective. It is "that the *facts* stated in the above *confession* are true." A verification of the whole statement was required. It is not necessary upon this motion to de-

termine whether the term "facts," includes the entire contents of the statement (Fitzhugh vs. Truax, 1 *Hill*, 644; Whelpley vs. Van Epps, 9 *Paige*, 332). Nor whether the word "confession" should be construed as thus comprehensive. No evasiveness or uncertainty in the affidavit required, in respect to any material point, should be tolerated.

The blank for the day of the month in the jurat to the affidavit does not, I think, affect the validity of the judgment. It is shown by the opposing affidavit that the oath was taken before the judgment was entered.

The provisions of the Code in respect to the judgment, not having been complied with, the judgment must be regarded fraudulent and void, as against the junior judgment creditors, and they are entitled to have it set aside to that extent (Plummer agt. Plummer, 7 *How. Pr. R.* 62).

The order applied for is accordingly granted, with $10 costs.

SUPREME COURT.

Mann and Savage agt. Brooks.

Where a defendant, in the statement in writing made necessary by section 383 of the Code (judgment by confession) states that he on a certain day made and delivered to the plaintiff a note or bond, for the payment of a certain sum, he "states concisely the facts, out of which the debt or demand arose;" and if he verifies that statement by his oath, he does all that section 383 requires of him. (*The case of Plummer agt. Plummer, ante page 62, not concurred in; also adverse to the next preceding case.*)

A debt o demand arises on a note or bond the moment it is made and delivered to the payee.

The difference between § 383 and the 8th *section of ch. 259 of the laws of* 1818, pointed out, and the difficulties in a proper construction of § 383 of the Code stated.

This court have full power, under § 173 of the Code to order an amendment of a judgment record, as of the day the record was filed. And this question of amendment is between the plaintiff and defendant. No notice is necessary to be given to other judgment creditors of the defendant.

A feigned issue should not be directed upon a motion to set aside the judgment where the notice of motion merely asks (in addition to the principal motion) "for such further or other relief as the court may grant."

would tend to prevent surprise if the court would not listen to a prayer, until the petitioner has discovered and is able to give notice of what he wants.

Saratoga Special Term, February 1853. On the 27th of July 1852, a judgment on confession was entered in this cause in the county of Albany, for $1827·32 and five dollars costs. The confession stated that the indebtedness arose on a promissory note, payable to the plaintiffs and dated the 15th of July 1852, and the confession was verified by the defendant's affidavit. On the fifth of November 1852, the defendant made an affidavit that the said note was given for a balance of an account for goods purchased by the defendant of the plaintiffs, and for money borrowed of them, and that the whole sum mentioned in the note was justly due from him to them when the note was given, and no part thereof had been paid. On that affidavit, at a special term of the Supreme Court held in the city of Albany, on the 26th of November 1852, a rule was granted that the judgment record in the above cause be, and the same was thereby amended by filing the last mentioned affidavit with the said record *nunc pro tunc*, as of the date of filing said record, and that the clerk file the same accordingly, and execution was issued on the said judgment, and levied on the defendant's goods on the 30th day of July 1852.

A motion is now made on behalf of George C. Burditt and John L. Streit, to set aside the said judgment and execution, on the grounds, as is alleged in the notice of motion, that the judgment is fraudulent and was designed to defraud the said Burditt and Streit; that the facts out of which the indebtedness arose, do not sufficiently appear in the statement in the judgment roll, for the reason that the judgment roll has been altered without notice to said Burditt and Streit or their attorney. The notice of motion is dated on the 1st of December 1852, which was after the roll was amended. The affidavit on which the motion is made was made after the amendment, but it contains no notice of the amendment. The notice, however, states that the motion will be made on the affidavit and on the judgment roll, and on such other affidavits and papers as should thereafter be served on the plaintiffs' attorney.

JOSEPH POTTER, *for Motion.*

WM. D. WHITE and WM. A. BEACH, *Opposed.*

CADY, Justice.—The principal affidavit on which the motion is made on behalf of Messrs. Burditt and Streit is made by their attorney, who has not sworn to a single fact within his own knowledge tending to show any fraud *in fact*, except as to the proceedings on the part of his clients; he speaks of information and belief, and if a feigned issue was awarded, he could not be a witness to prove a fact in the case, except what he had done for his clients. In addition to the affidavit of the attorney, the affidavits of Archibald Bull, Messrs. Burditt and Streit and J. H. Sterne, have been read. Mr. Bull swears that the defendant in July 1851, declared that he owed no one any thing. J. H. Sterne proved the same thing. These witnesses could not be sworn on the trial of a feigned issue unless Brooks should be sworn on the part of the plaintiffs, and then for the purpose of impeaching him in case he should deny having made the declaration; and Messrs. Burditt & Streit only swear that they trusted the defendant on the representations he made to J. H. Sterne, and that no notic· of a motion to amend the record has been served on them. They could not be witnesses on the trial of a feigned issue between them nd the plaintiffs; and Mr. Burditt, although he has been at the plaintiffs' store and was offered an inspection of the accounts between the plaintiffs and the defendant, he has not said a word impeaching the fairness of the plaintiffs' judgment; and it is proved by the affidavit of George H. Olmstead, that in August last, Mr. Burditt expressed himself to be perfectly satisfied with the justice and correctness of the plaintiffs' claim against the defendant, and according to the affidavits which have been read, there can not be a reasonable doubt as to the justice of the plaintiffs' claim, and I apprehend that the only question is whether there are such defects upon the face of the record as to make it the duty of the court to set aside the judgment and execution.

It is claimed on the part of Messrs. Burditt & Streit, that the judgment must be deemed fraudulent and void as to the creditors of the defendant, because the statement made by the defendant,

and verified by his oath, is not such as is required by chapter 3, title 12 of the Code. There is some difficulty in ascertaining the meaning of all the enactments in that chapter. Section 382 authorizes a judgment by confession "in the manner prescribed by that chapter." By section 383, "A statement in writing must be made, signed by the defendant and verified by his oath to the following effect:"

1. "It [what? the statement in writing,] must state the amount for which the judgment may be entered and authorize the entry of judgment therefor."

"2. "If it [the statement in writing] be for money due or to become due, it [the statement in writing] must state concisely the facts out of which it [the statement in writing] arose, and must show that the sum confessed therefor, is justly due, or to become due." The word *it* is used three times in the second subdivision of section 383, and it is difficult for me to say with entire confidence, what is its meaning when last used. The counsel for the parties on whose behalf the motion is made, reads the words, "out of which *it* arose" "out of which *the debt* arose;" but where is the authority for substituting the words "the debt," instead of the word "it"? The word debt, is not used in the chapter. The second subdivision of section 383 may be read as follows: If it [the confession] be for *money* due, or to become due, it [the confession] must state concisely the facts out of which it [the confession] [or the money] arose; but if the subdivision can be so read, the legislature has not declared what the consequence of the non compliance with the terms of the law shall be.

The chapter does not contain an intimation for whose protection the confession or statement in writing must "*state concisely the facts out of which it arose.*" It has been assumed, that unless the statement in writing, or confession, be as required by section 383, the judgment is to be deemed fraudulent as to the creditors of the party making the confession; but the legislature have not so enacted. As a general rule, when the legislature undertake to regulate the practice in an action, it is only the parties to the action who have a right to complain in case the requirements of the statute be not complied with. The Code prescribes how and when notice of trial or of a motion, shall be

given, but it does not declare what the consequence shall be, if the notice be not given as required. But according to the practice under that enactment, only the parties on whom the notice is served, can object to it; a creditor would not be allowed to impeach the judgment, because the defendant, his debtor, did not prevent a trial and judgment by objecting that legal notice of trial had not been given. The Court of Kings Bench, in the 4 Geo. 2, made a rule that a warrant of attorney to confess judgment made by a party in custody, should not be valid unless there was present "some attorney on behalf of such person in custody, expressly named by him, and attending at his request" (Hutson vs. Hutson, 7 *Term Rep.* 7). This rule was for the protection of the party giving the confession, and not his creditors, and to protect the party giving a warrant of attorney to confess judgment. The legislature as early as the 27th of February 1788, passed an act prohibiting the entry of a judgment in virtue of any warrant contained in any bond, bill, covenant, or other contract (2 *Greenleaf's edit. of the Laws*, 111. § 24).

The counsel for the parties, on whose behalf the motion to set aside the judgment in this case is made, insists that the same construction is to be given to section 382 of the Code, as was required to be given to section 6 of chapter 259 of the Laws of 1818. That section made it necessary for the plaintiff or his attorney, in a judgment by confession, at the time of filing the record, to put on file, signed by him or his attorney, a particular statement and specification of the nature and consideration of the debt or demand on which such judgment was confessed; and in case such demand should arise on note, bond or other specialty, such statement and specification should particularly set forth the origin and consideration of the same; and if the fairness or validity of such judgment should afterwards be drawn in question, the parties making such specification should be bound and concluded thereby, and should not be allowed thereafter to set up or insist on any consideration for such judgment, not contained in such statement and specification, and if the plaintiff in such judgment should omit to file such statement or specification, *such judgment should be taken, decreed and adjudged fraudulent, as respected any other bona fide judgment creditors, and*

any bona fide purchaser, for valuable consideration, of any lands bound or affected by such judgment.

It was obvious upon the face of this enactment, for whose benefit it was intended, and the consequences of a non compliance with the law, are distinctly stated, and the meaning of the legislature is expressed in that section with such perspicuity that an attorney could readily understand what the statement or specifiation thereby required should contain. If that part of the section which follows the word *confessed*, had been omitted, the residue of the section would have required a statement or specification as particular as is made necessary by section 383 of the Code.

The words of the 8th section in the act of 1818, which immediately follow the word confessed, are, "and in case such demand shall *arise* on a note bond or other specialty, such statement or specification shall particularly set forth the origin and consideration of the same." These words show that if the statement or specification had set out a note, bond or other specialty, as the nature and consideration of the debt or demand, on which the judgment was confessed, that part of the section before the word confessed would have been satisfied. A debt or demand arises on a note or bond the moment it is made and delivered to the payee; and when a defendant in the statement in writing made necessary by section 383 of the Code, states that he on a certain day made and delivered to the plaintiff a note or bond, for the payment of a certain sum, he states concisely the facts out of which the debt or demand arose;" and if he verifies that statement by his oath, he does all that section 383 requires of him. I am aware of the opinion given by a distinguished justice of this court in the case of Plummer agt. Plummer (7 *How. Pr. R.* 62), in which a construction is given to the second subdivision of section 383 as comprehensive as was given to section 8, chapter 259 of the laws of 1818; but to my mind, there is an important difference between the two sections. That difference has already been noticed; in the case of Plummer agt. Plummer the record had not been amended before the motion was made, in this case, the record was amended before notice of the motion was given. In this case then, the motion may be [illegible]ied, even

should it be conceded that the case of Plummer agt. Plummer was correctly decided.

The commissioners of the Code, in their report referred to in the case of Plummer agt. Plummer, when speaking of judgments by confession, say, "without prohibiting this kind of security, it is deemed expedient in order to prevent the abuse of it, to require, in all cases, a statement of the grounds and *consideration of the judgment to be made*, and sworn to, and to have this a part of the judgment, so that its purpose and intent can not be denied and concealed." There is as much difficulty in understanding this part of the report, as there is in discovering the meaning of section 383 of the Code. Had that section, like the report, "required a statement of the *true grounds and consideration of the judgment*," would not that requirement have been literally complied with, by the statement in writing originally filed in this cause, and the affidavit of the defendant, that the sum for which the judgment was confessed, *was justly due to the plaintiffs?* According to the report of the commissioners, all they intended to require was that a statement of the true grounds and *consideration of the judgment should be made*, and sworn to. It can not be denied that the note mentioned in the statement in this case, was the *true ground and consideration of the judgment*, and if the commissioners or the legislature, in 1848, had intended that if a judgment was confessed on a "note, bond or other specialty," the consideration of such note, bond or specialty should be stated, they would, as the legislature in 1818 did, have said, "in case such demand shall *arise* on a note, bond or other specialty, such statement or specification shall particularly set forth the origin and consideration of the same." I can not persuade myself that any sound rule of interpretation will allow the same construction to be given to section 383 of the Code, as was necessarily given to the 8th section of the act of 1818, above mentioned; and that section was repealed because experience showed it was productive of no good effect, and that more honest men than rogues suffered by it. A man who is knave enough, deliberately to confess a judgment with intent to defraud his creditors, can easily be tempted to make any affidavit to uphold the judgment. The commissioners in their report, already no-

ticed, say: "Not only are judgments by confession perverted to fraudulent ends, under the existing laws, but the form of confessing is an *idle ceremony*," and then give a graphic description of the manner in which a judgment might be confessed to defraud creditors. Mortgages or conveyances of real or personal estate, can be made with as much facility to defraud creditors, as judgments can be confessed, and is it certain that since the Code became the law of the land, judgments to defraud creditors may not be entered up with as much facility as they could before? Although chapter 3, title 12 of the Code, may have been intended by the commissioners to close the door against fraudulent judgments; yet chapter 4 of the same title, seems to have opened the door as wide as it was immediately preceding the Code. Chapter 3 authorizes the confession of judgments without action; but chapter 4 authorizes the confession of judgment in an action founded on contract, and how many more seconds of time will it require to obtain a judgment under chapter 4 than under chapter 3? Under chapter 4, a summons and complaint must be served, and the defendant may instantly serve upon the plaintiff an offer (not a confession) in writing, to allow judgment to be taken against him for the same, as to the effect herein specified. The plaintiff may instantly accept the offer, file the summons, complaint and offer, with an affidavit of notice of acceptance, and the clerk shall thereupon enter judgment accordingly. To obtain a judgment under chapter 4, there must be a summons, complaint, and affidavit of service, the defendant's offer to allow judgment to be taken against him, notice of acceptance and an affidavit of notice of acceptance, and on filing these papers, the clerk enters judgment. It is true, that to obtain a judgment under chapter 4, requires one more affidavit and a number of other papers not necessary under chapter 3; but an attorney with printed forms, could perfect a judgment under chapter 4, almost as soon as the statement required by chapter 3, could be made.

The important difference between the two chapters seems to be, that by chapter 3, there must be a statement in writing, showing the consideration of the judgment, and an affidavit of the defendant showing that the sum for which the confession is given, is justly due, or to become due to the plaintiff.

Under which chapter would a rogue who wished to defraud his creditors, but was not quite ready to commit perjury, confess a judgment? The answer must be, under chapter 4, and I can not discover any benefit that will be secured to creditors by giving to chapter 3 the construction asked for by the parties who make this motion. The case of Lawless vs. Hackett (16 *J. R.* 149), was decided under a statute, as I have attempted to show, different in its provisions from section 383 of the Code, and can not govern this case. But suppose I am in error as to the construction of section 383, was not the record in this case rightfully and sufficiently amended? The record in this case was filed in the city of Albany, in the third judicial district. The Supreme Court at a special term in that district, ordered the record to be amended, as of the day the record was filed. That court had full power to order the amendment, under section 173 of the Code.

But, it is said, that amendment was made without notice to Messrs. Burditt & Streit; there is no evidence that the plaintiffs knew that Messrs. Burditt & Streit had a judgment against the defendant in this suit. The plaintiffs were under no greater obligation to give Messrs. Burditt & Streit notice of their motion to amend the record, than Messrs. Burditt & Streit were to give the plaintiffs notice that they had a judgment against the defendant. The question whether the record should be amended or not, was a question between the plaintiffs and defendant. If Messrs. Burditt & Streit were entitled to notice of the plaintiffs' motion to amend, this, instead of a motion to set aside the judgment, should have been a motion to set aside the order to amend, on the ground that the plaintiffs were not served with notice of the motion to amend. I must upon this motion take it for granted that the motion to amend, was regularly made, and the order rightfully granted. It is asked on the part of Messrs. Burditt & Streit, that if the motion to set aside the judgment be not granted, that a feigned issue be directed to try the question of fraud. The notice of motion contains no notice that a feigned issue would be asked for, but the notice does state that "they will ask for such further or other relief as the court may grant." Relief has sometimes been granted on a notice as general as this, but I am inclined to believe that it would tend to prevent sur-

prise, if the court would not listen to a prayer, until the petitioner has discovered, and is able to give notice of what he wants. But what evidence has Messrs. Burditt & Streit furnished in this case, which would justify the court in awarding a feigned issue? Messrs. Burditt & Streit have, as has already been stated, both made an affidavit, which has been read, and in which they have not expressed even a belief that the plaintiffs' judgment was fraudulent, or without a good and sufficient consideration; nor have they read the affidavit of any person, who has testified to a fact which would be evidence against the plaintiffs, that their judgment is without consideration. I am of opinion that it would be an improper exercise of the discretion of the court, to grant a feigned issue. I therefore deny the motion to set aside the judgment or grant a feigned issue, with ten dollars costs, to be paid by Messrs. Burditt & Streit, to the plaintiffs.

SUPREME COURT.

WHITNEY agt. KENYON.

Where, in a judgment by confession under § 383 of the Code, the *statement* merely set out a *copy of a promissory note* as the foundation of the debt for which the judgment was confessed, *held* that the judgment for that reason was not *fraudulent* and *void*. At most a non compliance with the statute in this particular can be considered merely as an irregularity, and amendable, but not after one year.

Although the forms of procedure in the confession of judgment were designed to prevent fraud, a technical non compliance should not be held, by implication, conclusive evidence of fraud, even in favor of those whom it may be supposed the legislature designed to protect.

What effect, as evidence, a non compliance with this statute should have upon an allegation of fraud in fact, *quere?*

(*The case of Plummer agt. Plummer, ante p.* 62, *not concurred in. This case, so far as similar points are discussed, seems to agree with Mann & Savage agt. Brooks, ante p.* 449.)

Oswego Special Term, March 1853. The administrator of the defendant moves to set aside a judgment entered by confession this court in November 1849. The defendant died in January

1850, and in March 1851 letters of administration upon the estate of the deceased was granted to the person now moving. The affidavits show the estate of the defendant in the judgment to be insufficient for the payment of his debts, and that if the judgment is paid in full, the other creditors will receive but a very small dividend.

J. C. CHURCHILL, *for the Motion.*

O. ROBINSON, *Contra.*

W. F. ALLEN, Justice.—The judgment purports to have been confessed for money actually due the plaintiff, and the objection is that the statement in writing required by section 383 of the Code, does not sufficiently state "the facts out of which it arose," it merely sets out a copy of a promissory note as the foundation or origin of the debt. As a mere irregularity, the party moving can not avail himself of the alleged defect in the statement of the consideration of the judgment, more than one year having elapsed since the judgment was rendered (2 *R. S. 4th ed.* 606, §2; *Code*, § 174; Park agt. Atwell, 5 *How. Pr. R.* 381)

It is claimed that the omission to set out the consideration of the note, and "the facts out of which the debt" arose, renders the judgment, fraudulent and void as against the creditors of the defendant, and Plummer agt. Plummer (7 *How. Pr. R.* 62), is relied upon to sustain this position.

If the judgment is in fact fraudulent and void, as against creditors, by reason of the omission, then the administrator of the defendant representing creditors (the estate being insolvent), may insist upon the objection and is entitled to the relief he asks (Babcock vs. Booth, 2 *Hill*, 181; McKnight vs. Morgan, 2 *Barb.* 171). The defect in the specification does not affect the jurisdiction of the court or the validity of the judgment as between the parties (Griffin vs. Mitchell, 2 *Cow. R.* 548). There is no fraud alleged in the affidavits, and the moving party relies entirely upon the legal implication of fraud arising from the want of a technical compliance with all the statutory requirements. The statute does not in terms attach any such penalty to the omission, and the omission does not appear to be of a matter which was of the essence of the act done. The statute, like every other

part of the Code, is modal, intended to regulate the forms of pro ceedings in courts of justice, and a non compliance with the prescribed formula renders the proceedings irregular; but in the absence of an enactment to that effect, should not render the proceedings fraudulent and entirely void. If simply irregular they may be amended—if fraudulent they are absolutely void.

The great object of the commissioners in recommending the adoption of the provisions of the Code regulating the confession of judgments, appears to have been to give publicity to the true purpose and object of the judgment, and to disclose the true consideration of it, and to show whether it was given to secure against a centingent liability or to secure a debt already due, and it is not necessary to go the length asked upon this motion to accomplish its full purpose. The learned justice by whom Plummer agt. Plummer was decided, followed Lawless vs. Hackett (16 *J. R.* 149), and Brinckerhoff vs. Marvin (5 *J. C. R* 320). Those decisions were made under a statute which in terms provided that upon the omission of the specifications required by the statute, "such judgments should be deemed fraudulent as respects any other bona fide judgment creditors, and every bona fide purchaser, for a valuable consideration" (*Laws of* 1818, *ch.* 259, §8). And by the same section the true consideration of any note which was specified as the foundation of the judgment, should be stated. Plummer agt. Plummer construes the Code as if both these provisions were incorporated in it. The chancellor in speaking of the act of 1818, in Seaving vs. Brinckerhoff (5 *J. C. R.* 332), says: "The act ought not to be extended by construction; and the ordinary lien of the judgment creditor, who might happen, through inadvertence, or through the error of counsel to omit as particular a specification as the act required, ought not to be impaired, except in favor of those particular persons who can bring themselves clearly and strictly within the letter and within the meaning and policy of the exception."

In Lawless vs. Hackett, a judgment creditor moved and the case was within the very words of the act. The act came under consideration in White vs. Williams (1 *Paige*, 502), and effect was given to it in behalf of a party who was in a situation

to take advantage of the statute remedy, one in whose favor the statute declared a judgment fraudulent. It is very evident that but for the express terms of the statute imposing the penalty for a non compliance with its requirements, the judgment would not have been held fraudulent, whatever other redress might have been given to creditors whose interests may have suffered from a non compliance with the provisions of law. The commissioners by whom the Code was reported can not be presumed ignorant of the act of 1818, and its particular provisions, and if they had intended to attach the penalties of that act to a non compliance with the Code, they would have said so; the act of 1818, or any thing like it, I believe, had not been in force in this state for seven years prior to the adoption of the Code. Although the forms of procedure in the confession of judgment were designed to prevent fraud, a technical non compliance with them should not be held by implication conclusive evidence of fraud even in favor of those whom we may suppose the legislature designed to protect. What effect as evidence a non compliance with the statute should have upon an allegation of fraud in fact, is not for me to say upon this motion, as there is no allegation of that character. For aught that appears, or that is suggested, the transaction was perfectly fair and the omission was the error of the attorney by whom the papers were prepared. I regret to be constrained to differ with my brother MASON, but can not but think that in the hurry of a special term he omitted to notice the terms of the act of 1818. That act was in fact, available only in favor of one class of creditors, viz., judgment creditors. There are no such here.

I am desirous of executing the Code, so far as I can, in its spirit; but am not willing without the express sanction of law, to punish as criminals, and adjudge guilty of fraud, and deprive of their rights and property, all who through misapprehension or inadvertence or the carelessness of attorneys, shall come short of a literal compliance with its requirements. The order vacating the sale and setting aside the execution was regular, or if irregular for the want of notice, in as much as no cause is now shown why the same should not have been granted, the same may stand. The affidavits in opposition to the motion show

that the application was made at the request of the administrator of the defendant, and if so he is estopped from complaining of it. The execution and sale under it were clearly irregular, and were properly set aside. The motion is denied without costs.

SUPREME COURT.

HINCHMAN agt. BUTLER.

There is now no distinction between the terms *venue* and *place of trial*.

A *demand* is not necessary before making a motion to change the place of trial for the convenience of witnesses, &c. under the 2d or 3d subdivision of section 126.

Such motion is more properly to be made after issue joined. Whether it may be made before, *quære*.

Montgomery Special Term, June 1852. This is an application to change the place of trial from the county of Montgomery to the county of Herkimer. The plaintiff resides in the former county and the defendant in the latter.

A preliminary objection is taken, on the ground that the notice of the motion is in the alternative, being to "change the *venue* or *place of trial*."

LOOMIS & GRISWOLD, *for Motion.*

D. P. COREY, *Contra.*

C. L. ALLEN, Justice.—The 125th section of the Code, provides that the action shall be tried in the county in which the parties or any of them shall reside at the commencement of the action; subject, however, to the power of the court *to change the place of trial* in the cases provided by statute. The 126th section declares that if the county designated in the complaint, be not the proper county, the action may, notwithstanding, be tried therein unless the defendant, *before the time for answering expires*, demand in writing, that the trial be had in the proper county, and the place of trial be thereupon changed by consent

of parties, or by order of the court, as is provided in *that* section. The language of the Code is uniform, as to the terms used, and is, I believe, in all cases, "*place* of *trial.*" Rule 48 (45) provides that in addition to what has been usually stated in affidavits to change venue, either party may state the nature of the controversy, and show how his witnesses are material, and may also show where the cause of action, or the defence, or both of them, arose; and these facts will be taken into consideration by the court in fixing the *place of trial.* The term *venue* is used as synonymous with the *place of trial* in the Code and in the rule, and was so used by all legal writers till the act of 1847; and I think either, used in the notice, would have been sufficient. What is the object of the motion? To have the *trial* in Herkimer instead of Montgomery; that is all the notice means, and whether *venue* is used or *place of trial*, or *both*, neither party can mistake the one single object sought to be obtained from the affidavit, which clearly shows that the change is claimed on the ground that the principal transactions on which the action is based, occurred in Herkimer county; and that the convenience of witnesses will be best promoted by a trial in that county. The word *vênue* may perhaps be properly used, when speaking of the statutory location as in the judiciary act of 1847, though, I think, the words, place of trial, would be just as well; but in reference to change for the convenience of witnesses, either or both may be properly adopted. By the 46th section of the judiciary act, it was enacted that the venue (the county where the papers were to be filed, and the judgment docketed) should be laid in the county, in which some of the parties resided; and if the venue should not be so laid, it should be changed to the proper county with costs of the motion, if notice should be given of such motion before the expiration of the time for pleading. By the 49th section it was provided, that a *change of the place of trial* might be made for the *convenience of witnesses*, thus making an apparent distinction, between the two terms. The Code, however, uses place of trial for both cases; and the rules, as before shown, treat them as synonymous, and the papers are to be transferred to and filed in the county where the place of trial shall be finally fixed. This objection can not be sustained.

Again, it is objected, that it does not appear that any demand in writing has been made, that the trial be had in the proper county. What is intended by the term "proper county," and to what have those words reference? Clearly the county designated in the complaint. The Code (§ 125) says, the action shall be tried in the county in which the parties or *any of them* shall reside, at the commencement of the action, and then declares (§ 126), that if the county designated in the complaint be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time for answering expires, demand in writing that the trial be had in the proper county; that is, the county where the parties or *any of them reside*, at the time the action is commenced.

In case the proper county is not named in the complaint, the demand must be made *before* the time for answering expires, or simultaneously with the service of the answer. Under the Codes of 1848 and 1849, there was no provision made for changing the place of trial except as contained in § 125. Now, however, express provision is made by the amendment of 1851. The latter part of § 126, reads as follows: "The court may change the place of trial in the following cases:

"1. When the county designated for that purpose in the complaint, is not the proper county.

"2. When there is reason to believe that an impartial trial can not be had therein; and

"3. When the convenience of witnesses and the ends of justice would be promoted by the change. When the place of trial is changed, all other proceedings shall be had in the county to which the place of trial is changed, unless otherwise provided, by the consent of the parties in writing, duly filed, or order of the court, and the papers shall be filed or transferred accordingly."

It is not clear but that the court possesses the power, by this amendment, to change the place of trial at any time, even on the ground that the proper county has not been designated in the complaint, although the defendant may have omitted to make the demand in the first instance. However that may be, it is perfectly evident that a demand was never contemplated in cases

arising under the 2d and 3d subdivisions of § 126. Instances might occur, making it proper to apply for a change under the 2d subdivision after the answer was served, or after one or two trials have been had; and it is well understood *now*, that the application under the 3d subdivision *must*, or at all events *may* be made after issue, (5 *How. Pr. R.* 409), and the new rules of the court, 44 and 45, clearly contemplate that the motion may be made after issue. Indeed, there is one very cogent reason *why* the motion should not be made until after issue. How is the plaintiff or defendant to know what witnesses will be material, until it is rendered certain or probable by the pleadings what issues are to be formed or tried? No party until then can safely swear what facts it will be necessary for him to prove, or by how many and what witnesses he expects to prove them. That the only demand contemplated, was the one to which I have alluded, is also evident from the construction which has been put upon the section, by several adjudged cases. In Moore agt. Gardner (5 *How. Pr. R.* 243), the plaintiff named Onondaga county in his complaint as the place of trial—neither party resided in that county. The defendant demanded to have the place of trial changed to *the proper county*. The plaintiff refused to change and defendant made his motion. The motion was resisted by the plaintiff, on the ground that Onondaga county was the most convenient place for his witnesses. The court granted the motion, however, and remarked that the question of convenience of witnesses was not in issue. That the plaintiff, on receipt of the demand, should have changed the place of trial to the proper county, and then moved to change the place of trial for the convenience of witnesses, and that the granting the defendant's motion would not preclude the plaintiff from making his motion at the proper time, to change the place of trial for the convenience of witnesses.

Suppose that in the present case, the plaintiff had designated in his complaint the county of Schenectady, as the place of trial. Of course that would not have been the proper county. What would have been the demand of the defendant under § 125? Clearly, that the trial be had in the *proper county;* that is, in either Montgomery or Herkimer, where one of the parties resided

(4 *Howard*, 81). The plaintiff might have consented to change to Montgomery, and the defendant would be remediless, as to moving to change the place of trial to Herkimer for the convenience of witnesses, after issue, as he could not safely swear before, as to their materiality or number. I am of opinion that the framers of the Code did not intend to create any such difficulty. *Again*, if a demand is necessary for a defendant in all cases before answer, the plaintiff would possess a decided advantage over the defendant. ,It has been decided, as already remarked, that the plaintiff may move on his part to change the place of trial, for the convenience of witnesses, at any time, or at all events without making a demand, as that necessity is confined to the defendant alone. He may do so after the court has changed the place of trial, to the proper county (3 *Code R.* 224).

The 2d and 3d subdivisions of § 126, do not confine the application to the defendant, but the court may make the change on the application of either party, when an impartial trial can not be had, or when the convenience of witnesses would be promoted by the change. That section was never designed, and ought not to be construed so as to give one party a benefit which could not be conferred upon the other. It was never intended that a demand in writing should be necessary, in case of an application under the 2d and 3d subdivisions. The second objection is not therefore well taken.

It appears from the defendant's affidavit, that the principal transactions between the parties occurred in the county of Herkimer. The action grows out of a contract, made between three parties and the canal commissioners, relative to work on the canal, exclusively done in that county. The money was expended there. The parties resided there at the time. The affidavit of the defendant showing the number of witnesses, the nature of the defence, and stating specifically the points of defence which each witness is expected to prove, or establish, is very full. All these facts stand admitted by the plaintiff, as he has interposed no opposing affidavit. If he could have denied or explained any of these statements, he undoubtedly would have availed himself of the opportunity (Jordan agt. Garrison, 6 *How. Pr. R.* 6). The motion must be granted.

SUPREME COURT.

GOODRICH agt. VANDERBILT AND DREW.

The place of trial of a transitory action should be in the county where the principal transactions between the parties occurred, unless the preponderance of witnesses is so great as to warrant the court to retain the place of trial in another county.

It seems, that the objection to changing the place of trial to the city and county of New York, on account of the pressure of business in that city and apprehensive delays in the trial, may be obviated by granting an election to the parties to substitute an adjoining county, Kings, Richmond, Westchester or Rockland.

Washington Special Term, September 1852. Motion in this and seven other causes, to change the place of trial in five from the county of St. Lawrence, and in the remaining three from the county of Franklin, to the city and county of *New York*.

This is an application on the part of the defendants, who are residents of the city and county of New York, to change the place of trial from the county of St. Lawrence to that city and county. The affidavit of Cornelius VanderBilt, one of the defendants, states that the action is brought to recover damages of the defendants, which the plaintiff alleges he has sustained, by reason of his not having been conveyed from the city of New York to San Francisco, California, by a line of transportation, known by the name of Vanderbilt's line for California, via Nicaragua, and in pursuance of an alleged contract for such conveyance, which the plaintiff claims was made by the defendants; and also to recover damages for expenses, detention and injuries alleged by the plaintiff to have been sustained by him on the way from San Juan del Norte to San Juan del Sur, and other expenses incurred by plaintiff on his return from San Juan del Sur to the city of New York. The defences are, that defendants are not the owners of said lines, or liable for said damages; that all the damages claimed have not been sustained; that the plaintiff did not make the contract for his transportation from New York to San Francisco, in the manner alleged in the complaint; that at the time of the purchase of his tickets, there was a com-

pany for the transportation of passengers from San Juan del Norte to San Juan del Sur, by the Nicaragua transit route, called the Accessory Transit Company of Nicaragua. That said transit route did not belong to defendants, and that plaintiff did not purchase his ticket for transportation over that route of defendants, but of said Accessory Transit Co, or their agent. That at the same time, the steam ship North America belonged to the defendants jointly, and plaintiff purchased his ticket from defendants for his transportation from San Juan del Sur to San Francisco, in the said North America, and also purchased a ticket for his transportation from New York to San Juan del Norte. That the plaintiff was transported from New York to San Juan del Sur, but was not transported from San Juan del Sur to San Francisco, by reason of the accidental and unavoidable loss by the perils of the sea, of the said steam ship North America, which loss was unknown at the time of the sale of the tickets to plaintiff. That after the loss was discovered, the plaintiff parted with his ticket for his passage by the North America, in consideration of receiving a passage from San Juan del Norte to New York, on board the steam ship *Daniel Webster*, owned by the deponent That the sale of the tickets to plaintiff was made in the city of New York, and that the places of business of defendants and the Accessory Transit Co. are, and were at the time of the sale of said tickets, in the said city. The deponent then swears to the names of *twenty-three witnesses*, each and every one of whom are material and necessary witnesses, as he is advised by his counsel and believes, for the defence; all of which said witnesses reside in the city of New York, *except* Daniel B. Allen and Jacob H. Vanderbilt, who reside in the county of Richmond, but transact their business in New York; and except Henry Churchill and Reuben Lord, who are the master and purser of the steam ship Prometheus, sailing between San Juan del Norte and New York, being the ship in which plaintiff was transported to San Juan del Norte. That one of the witnesses named is the agent of the several owners of the line known as Vanderbilt's line, and sold the tickets to the plaintiff for his passage, and is a material witness to prove the circumstances attending such sale, and for whom he acted in the sale; that five others

of the witnesses named are clerks in the office of transportation, and are material to prove the manner in which the business of the line is conducted, and the *circumstances* attending the voyage in question. That three others of the witnesses named, are *one secretary*, and another *treasurer* of the Accessory Transit Co., and the third was the general agent of said company at Nicaragua, and had charge of the transportation of the passengers across the isthmus, and are material to prove the sale of the tickets by the company, the ownership of the said transit route, and the mode in which its business was conducted, and the circumstances attending the plaintiff's passage. That two others of the witnesses named, were part owners of the line of steamers running on the Pacific ocean in said line of transportation, and are material to show how the line was formed. That of two others, one was *purser* and one *master* of the steam ship Prometheus, when plaintiff sailed from New York on board thereof, and are material to show how said plaintiff was received on board said Prometheus, his transportation to San Juan del Norte, and the delivery to plaintiff of his ticket by the transit route. That one other witness was the manager of the steam boats on the river San Juan, when plaintiff went from San Juan del Norte to San Juan del Sur, and is material to show the circumstances attending his passage to San Juan del Sur; that another was on the isthmus of Nicaragua at the time of plaintiff's arrival, and is material to prove the occurrences there; that three others were employed on board the steamers of the transit company at the time plaintiff went to San Juan del Sur, and are material to testify as to the detention and injuries sustained by the passengers on said route. That of two others, one was *master* and the other *engineer* of the steam ship North America at the time of her loss, and are material to prove the facts relative to such loss. That another was purser of the Daniel Webster, when plaintiff returned to New York on board said ship, and is material to prove the circumstances attending that return; and that the last (Jacob H. Vanderbilt), was on the isthmus when the passengers of the North America arrived there, and made arrangements for their return, and is a material witness to prove the occurrences on the isthmus.

The plaintiff in his affidavit, by which he seeks to resist the application, states that his residence is in Massina in the county of St. Lawrence, where it has been for several years; that the business between him and the transportation company (deft's), was transacted between him and Daniel P. Allen and James Rentoul, two of the witnesses named in defendants' affidavit, alone; and that the other four persons named as clerks, were not present at the sale of the tickets, or only two of them, and they were so remote as not to be able to know, or to have heard any thing of the transaction. That at the time he received tickets from Allen, *one* for a passage from New York to San Juan del Norte by the Prometheus, one for a passage from San Juan del Norte to San Juan del Sur, and one for a passage from San Juan del Sur to San Francisco by the North America; and received no other tickets from any other person, *except* that while on board the Prometheus, the ticket for a passage from San Juan del Norte to San Juan del Sur, was taken up and another given in exchange. That three others of the witnesses, the secretary, treasurer and agent of the transit line, were neither of them present when he received his tickets, and can personally know nothing of the transaction. That Reuben Lord was not *purser* of the Prometheus at the time stated by defendant in his affidavit, but that another witness named by defendant (Hopkins) was such purser. That Banker, another witness named by defendants as manager of the steam boats, was at San Juan del Norte when plaintiff arrived there, but did not go across to San Juan del Sur, and can personally know nothing of the circumstances attending the passage from San Juan del Norte to San Juan del Sur. That he does not know and never saw, to his knowledge, *Skinner*, another witness, nor did he know any thing of Jacob H. Vanderbilt, until he saw him on board the Daniel Webster, on his return to New York. That he has fully stated to his counsel the facts which, according to his information and belief, defendant can prove by fifteen of the witnesses named in Vanderbilt's affidavit, and his counsel has advised him, and he believes that neither of said fifteen witnesses can be material or are necessary for the defendants on the trial. That he has stated to his counsel the facts he expects to be able to prove on said trial, by each of twenty-eight

witnesses, whose names he sets forth, and that each and every of them are material and necessary, and he can not safely proceed to the trial without the testimony of each and every of them, as he is advised by his said counsel and believes. That ten of the witnesses reside in Massina, forty miles from the court house in St. Lawrence county, two at Ogdensburgh, three in Madrid, five in Norfolk, three in Louisville, all in St. Lawrence county, two in Malone, and one in Bangor in the county of Franklin, and one in Canada West, varying from twenty to sixty miles from the court house, and all about 400 miles from New York. That seven of the witnesses were with him at the office in the city of New York when he made his contract and purchased his tickets from Allen and Rentoul, and all heard and remembered what was said at the time; that they all took passage with him and were with him during the whole of his passage to San Juan del Sur, and remained with him during his stay, and returned with him to New York, and are fully acquainted with all the facts connected with the whole matter. That eleven others of the witnesses named have all been in California by way of the isthmus of Nicaragua, and are all acquainted with the climate and unhealthy exposures to which persons detained on the isthmus are subjected, and are also acquainted with the state of business and rates of wages in California, and the value of the plaintiff's time there: that three of them went out to California last spring about the time plaintiff started to go there, and returned a few months since. That another witness (——) returned from California about two months ago, and two others (both the Willsons) returned later by the said Nicaragua route. That another (Jackman) was on the isthmus of Nicaragua when plaintiff was there and knew his condition and exposure while there. That the remaining eight have for several years resided near neighbors of plaintiff, and are intimately acquainted with the circumstances attending his leaving for California, and with his condition when he returned, and knew the value of his time, and are each of them material to prove these facts.

FLANDERS, WHEELER and TAYLOR, *for Plaintiff.*

HORACE F. CLARK, *for Defendants.*

C. L. ALLEN, Justice.—The 45th rule of this court provides, that "in addition to what has usually been stated in affidavits concerning venue, either party may state the nature of the controversy and show how his witnesses are material, and may also show where the cause of action or the defence, or both of them arose; and these facts will be taken into consideration by the court in fixing the place of trial." It is in reference to this rule that both parties have endeavored to shape their affidavits in support and resistance of this motion. I have carefully looked into these affidavits, and also into the pleadings, copies of which have been submitted by the parties, and I am unhesitatingly drawn to the conclusion that the place of trial should be changed. It is perfectly clear that the contract upon which this action is founded, and all the transactions relating to it, occurred in the city of New York, at the office of the transportation line of the defendants, called the Vanderbilt line. About this there is no dispute. The plaintiff alleges it in his complaint and it is admitted and claimed to be so by the defendants. The circumstances occurring after the purchase of the tickets, and which form the subject matter of the action, all happened in that city, and on the voyage and transportation from there to San Juan del Norte to San Juan del Sur and back to New York, on board the ships of defendants or those of the Accessory Transit Co. and during the transportation of plaintiff from San Juan del Norte to San Juan del Sur. It has been repeatedly decided that the place of trial of a transitory action should be in the county where the principal transactions between the parties occurred, unless the preponderance of witnesses is so great, as to warrant the court to retain the place of trial in another county. It manifestly appears that many facts and circumstances, which transpired in New York and on the voyages, must be given in evidence on the trial. Indeed most of the facts to be established happened at a great distance from St. Lawrence county, and I can perceive no testimony very material to show by witnesses exclusively from that county except the allegation in the complaint, of the condition of the plaintiff when he started for California, and his ms'ances at that time.

The plaintiff has shown by his affidavit that he has five more

witnesses than the defendants, who reside in the county of St. Lawrence and its vicinity. It must be remembered, however, that he does not state that he will be unable to prove the facts, or any of them, which he expects to establish by their testimony, by any other witnesses residing in New York or its vicinity. It is more than probable that he can establish most of them more fully, particularly as to the unhealthiness of the climate on the isthmus, and the rate of wages in California, by witnesses residing there, than by those residing in the county of St. Lawrence. Nor can I discover that he will need all or nearly all of the witnesses whom he names, to prove each of the particular facts to *which he claims* they will testify. For instance, the seven first witnesses were all present, as he states, in the office when the contract was made, and each of them distinctly recollects all that was said on that occasion. That only two other persons besides himself were present, and these were Allen and Rentoul, the two clerks of defendants. Can it be urged that he will need all those seven witnesses to prove that contract? Or will not any *one, or two* of them at farthest, be sufficient for that purpose? If it be said the defendants have sworn that five or six other persons were present and witnessed the transaction, and that they will be sworn as witnesses for defendants and that plaintiff will consequently need the whole seven on his part, then he is incorrect in stating that but two others were present, and if they were all present, then their number balances the plaintiffs number on that point. It is to be remarked too, here, that these seven witnesses are each of them plaintiffs in an action against these same defendants, growing out of the same transaction, which actions are all at issue, and in all of which motions are made to change the place of trial, and in which these seven witnesses are named as material in every action except the one in which they are plaintiffs; and it is said that they are necessary to prove all the other facts on which the plaintiff relies for a recovery, as they accompanied him throughout the whole adventure until his return, to New York. Be it so; will they all be needed to prove the same facts, many of which can be established by other witnesses, residing in New York or its vicinity, and others of which are not disputed by the pleadings?

Again: the eleven witnesses severally named by plaintiff are represented as being acquainted with the climate and unhealthy exposure to which persons detained on the isthmus of Nicaragua are exposed, and the state of businesss and rate of wages in California. How is it probable that these eleven witnesses will all be needed to prove those facts? In the first place, I do not understand it to be pretended by the answer, that the climate on the isthmus of Nicaragua is not as detailed in the plaintiff's affidavit, and that persons detained there are not subjected to exposure by such detention; that if it were denied, the seven witnesses first named who were with plaintiff at the time, are most competent to prove the dangers to which he was exposed, and any witnesses of either plaintiff or defendant, could not fail to establish a fact, about which there seems to be no dispute. So any two witnesses could prove the state of business and rate of wages at California, at the time plaintiff sought to go there, if it should be deemed proper and material to prove that fact on the trial. It appears to me that the testimony of all these eleven witnesses, or at least the most of them will not be necessary for the plaintiff. The witness Jackman, also, can only prove what the seven first witnesses, or any of them can establish. Then, as to the eight witnesses who are intimately acquainted with the circumstances of plaintiff's condition and circumstances when he left for California, and when he returned. It can not be, that they will all be necessary for that purpose; the seven first witnesses know, probably, the same facts; and if they do not, two of the eight will be amply sufficient to prove the facts sought to be established by that class of witnesses. The plaintiff, I am satisfied, will not have occasion to call on the trial one-half of the witnesses he has named.

On the other hand, I have looked at the affidavits of the defendants, and though as to some of their witnesses, the same remarks are applicable as to those of the plaintiff; yet I can not perceive why they (defendants) will not be obliged to call the greater part of the witnesses named by them. The plaintiff has attempted to explain some of the statements in defendants' affidavit, and objects that it is not deposed that the witnesses are acquainted with the facts, which they are expected to prove. I

think the criticism is *over nice.* The defendants show as well as the plaintiff, that Allen and Rentoul were present when the contract was made, and must know the facts concerning and connected with it. As to the other witnesses, the affidavit states their particular situation and the relations in which they severally stood, during the occurrence of the circumstances, and that they are material and necessary to *prove the particular facts to which they will be called.* How could they prove or testify to these facts, unless they possessed a knowledge of them, by being present at the time of their occurrence? or unless they were cognizant of them from their situation as agent, purser, officer or hands on board the ships of the defendants? It appears to me the affidavit is sufficient for the purpose intended.

The plaintiff has attempted to get rid of fifteen of the defendants' witnesses by swearing that he has stated to his counsel the facts to which he *believes* each of them can testify, and that his counsel has advised him that their testimony can not be material or necessary for the defendants on the trial, and that he so believes. He undoubtedly swears to such belief in good faith; but it is not to be supposed that he can know all the facts which the defendants expect to prove, or that will be proved by their witnesses. They have probably not disclosed to him their testimony. It is sufficient that they have done so to their own counsel, and that he has advised them as to its necessity. The defendants could, probably, make a similar affidavit as to many of the plaintiff's witnesses, and make it in as good faith, as the plaintiff has sworn to his statement, and yet the court would not undertake to say these witnesses would not be material to the plaintiff. Each party knows better than his adversary what facts he can prove, or expects to prove by his several witnesses, and the court places reliance accordingly on the affidavits made by each.

On the whole, without going into a further examination, I am satisfied, as before remarked, that the place of trial should be changed. The convenience of most of the witnesses will be best consulted by the change, which, with the fact that the cause of action originated in New York, seems to render the granting of the motion almost imperative 4 *How. Pr. R.* 84; 6 *id.* 6; 4 *Hill,* 68, 536; *Rule* 45; 3 *How. Pr. R.* 71). It was said that the

change of the place of trial to the city of New York would prove ruinous to the plaintiff, as he would be subject to the great delay and expense inseparable from trials in that city. This, no doubt, would prove a serious evil, though one which the court could not probably take into consideration. But as the defendants offered to stipulate that the place of trial might be changed to some one of the adjacent counties, an order must be entered changing the place of trial from the county of St. Lawrence to the city and county of New York, *unless* the plaintiff shall elect by notice in writing, to be served on defendants' attorney in twenty days after service of notice of this order, to try the action in some one of the counties of Kings, Richmond, Westchester or Rockland; the costs of this motion to abide the event of the suit.

SUPREME COURT

In the matter of the Reformed Presbyterian Church of the city of New York.

A forfeiture of the charter of a corporation can not be alleged, nor the question of forfeiture considered upon a collateral proceeding. Even where the terms of the charter are that the corporation *shall be dissolved*, on the non performance of a condition, the mere failure to perform is not, *ipso facto*, a dissolution, but judicial proceedings, and a judgment of ouster must be had to effect a dissolution.

Where a religious corporation, formed under the act of April 5th, 1813 (the general incorporating act), conveyed to individual members, lots in their burial ground, the deed running "to the,party of the second part, his heirs and assigns for ever, to be used for the purpose of a burial place only," *it was held*, that this is a grant of the use of the lots as a place of burial in subordination to the right of the corporation in the soil or freehold, and that the trustees have a right, upon complying with the provision of the statute, and by leave of court, to sell the property and remove the remains of the dead.

Provision should be made, in such case, to secure a proper place of burial for the remains disinterred.

New York Special Term, January 1853. This was an application on the petition of the Reformed Presbyterian Church

for leave to sell real estate. The facts appear sufficiently by the opinion of the court.

G. M. SPEIR, *for Petitioners.*

F. R. TILLOU, *for Respondents.*

EDWARDS, Justice.—The first objection which is made to this application is, that the petitioners failed to render an account pursuant to the provisions of § 10 of the act of April 5th, 1813, "for the incorporation of religious societies" (*Laws of* 1813, *p.* 217).

Assuming, for the purposes of this matter, that the petitioners have neglected to render the account required by the statute, and that by reason of such neglect they have subjected themselves to a forfeiture of their charter, and that the act of March 30th, 1850, does not relieve them from such forfeiture; still no valid objection can be made to this application upon that ground, for it is well settled in this state that the question of forfeiture can not be considered upon a collateral proceeding, and that even where the terms of the charter are that the corporation shall be dissolved on the non performance of a condition. The mere failure to perform is not *ipso facto* a dissolution, but judicial proceedings and a judgment of ouster must be had in order to effect a dissolution (People vs. Manhattan Co. 9 *Wend.* 351; Bank of Niagara vs. Johnson, 8 *Wend.* 645).

The next objection is that there is not such a consent to the application as is required by the act of April 11th, 1842 (*Laws of* 1842, *p.* 259).

The petition sets forth that the whole of the male members of the congregation have given their consent, and such consent, duly proved, is annexed to the petition. The respondents say in their affidavits, that three-fourths of those who have signed the consent, are *not interested in the premises described in the petition.* The answer to this is that the statute does not require that they should be. All that is required is that there shall be a consent in writing of three-fourths in number of the *congregation* or *society* of the church or congregation.

The next objection taken is that the respondents have such an interest in the lots which they claim that the corporation of the

church has no power to make, and that this court has no power to grant the application

The terms used in the instrument under which the respondents claim a right of burial are, that the corporation "do sell, convey and confirm unto the party of the second part, his heirs and assigns for ever, to be used for the purpose of a burial place only, that certain piece of ground, &c." If this is to be construed as a conveyance in fee, then the respondents have no interest whatever in the premises; for the corporation had no right to make such conveyance without the authority of the chancellor, and it is not pretended that they had such authority.

In my judgment the proper construction to be given to the instrument is, that it is a grant of the use of the lot as a place of burial in subordination to the right of the corporation in the soil or freehold, and that the trustees have a right, upon complying with the provisions of the statute, to sell the property and remove the remains of the dead, if this court shall deem it proper, in the exercise of its judgment, to authorize them to do so.

I think that a proper case is made out by the petitioners, to entitle them to the order which they ask for; but a provision must be made in the order which shall secure a proper place of burial for the remains which shall be disinterred.

SUPREME COURT

Baker agt. Curtiss.

Where the action is commenced by service of the summons without the complaint, and the plaintiff neglects to serve a copy of the complaint within twenty days after demand, it is proper for defendant to move to *dismiss the complaint*. If the motion is granted the action is discontinued or dismissed. The motion is founded on §274 of the Code.

After notice of such a motion is served, and a copy of the complaint subsequently served on the defendant, the latter is not bound to return it immediately or be deemed to have waived the right to make his motion.

Erie Special Term, February 1853. The action was commenced by the service of a summons the 22d December last: and

on the 11th day of January the defendant's attorney served notice of appearance and demanded a copy of the complaint.

February first, the defendant's attorney caused a copy of affidavit and notice of this motion to be served upon the plaintiff's attorney by leaving them in a conspicuous place in his office, in his absence. The same day, late in the afternoon, a copy of the complaint was served personally upon the defendant's attorney at his office. The defendant's attorney did not make any objection or explanation. He retained the copy complaint until the 16th February, the first day of the special term, when he returned it with a notice that it would be disregarded for the reason that it had not been served in time. The notice of the motion is that the complaint be dismissed for want of prosecution.

A. A. Howard, *for Defendant.*

Geo. W. Houghton, *for Plaintiff*

Marvin, Justice.—It is objected by the plaintiff that the Code does not authorize this motion (§ 274); that the motion should have been for judgment of discontinuance, under the 2d *R. S.* 350, § 25–26, which provisions of the Revised Statutes, it is claimed, are not repealed; and sections 469, 470, 471 of the Code, and the 90th rule are referred to. By section 274 of the Code, the court may dismiss the complaint with costs in favor of *one* or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the *defendant* or defendants served. The motion was proper under this provision of the Code. A copy of the complaint must be served within twenty days after demand (*Code*, § 130). The defendant's attorney is not bound to accept a copy of the complaint after the time has elapsed (Mandeville vs. Winne, 5 *How. Pr. R.* 461). The statute has fixed the time within which the plaintiff must serve a copy of the complaint after demand, and if he fails to serve the copy in time, we must regard it in contemplation of section 274, as an unreasonable neglect to proceed in the cause against the defendant who has been served with the summons, and the motion may be, in the language of that section, to *dismiss* the complaint; though in point of fact, no complaint may have been made. If the motion

is granted, the *action* will be discontinued or dismissed (see Colvin agt. Bragden, 5 *How. Pr. R.* 124).

A copy of the complaint was served personally upon the defendant's attorney the next day after the time for service had expired, and a few hours after the notice of this motion had been served by leaving the notice, &c., in the office of the plaintiff's attorney. He did not refuse to receive the copy complaint nor did he offer to return it until after the lapse of fifteen days, when, on the first day of the term, he returned the copy complaint with notice that he disregarded it. These facts appear from the opposing affidavits. The defendant's attorney has had no opportunity of explaining any of the facts to which they relate. They do not, however, show an express waiver by the defendant's attorney of this motion. But it is claimed that the doctrine of waiver should be applied. Had the copy complaint been served before the notice of the motion, and the attorney received it without objection, or if he had no opportunity to object, had retained it without giving notice that he should disregard it, I should not hesitate to apply the doctrine of waiver. Though the service may not be made in time, still it will be good if the attorney consents to accept the service. He may waive the right which the statute gives him of having a copy of the complaint served upon him within the twenty days, and when service is made, after the time, he should refuse to accept the service, or should return the complaint promptly, or at least give notice that he should disregard it, so that the plaintiff's attorney may be advised that he is not to rest in security upon the belief that service has been accepted, and so that he may take promptly the proper steps to be relieved; that is, permission to serve a copy of the complaint, notwithstanding the time for service has expired (see Wirts vs. Norton, 25 *Wend.* 699; 3 *Hill*, 476; 1 *How. S. T. R.* 240; 2 *id.* 146; 3 *id.* 64).

But should these principles be applied to the present case? The defendant's attorney had given notice of the motion before the copy complaint was served upon him, and it seems to me that the plaintiff's attorney should have ascertained clearly, under these circumstances, whether the defendant's attorney intended to accept the complaint absolutely, and waive his motion,

and there should have been an understanding as to costs. It appears that the defendant's attorney did not at the time the complaint was served, say any thing about the notice of this motion, which had been left in the office of the plaintiff's attorney a few hours before. It may well be that he supposed the plaintiff's attorney had seen the notice and that it was quite unnecessary for him to speak of it. It is stated in an opposing affidavit that he did not refuse to receive nor offer to return the complaint (at the time of service), but it does not appear how much time the party serving the paper spent in the office, or whether the defendant's attorney examined the paper and knew then that it was a copy of the complaint in this cause. I am clearly of the opinion that the facts disclosed do not show an express waiver of the right to pursue the motion. I should have been better satisfied with the practice of the defendant's attorney, if he had promptly returned the complaint, or given notice that he should disregard it, especially as he intended, as now appears, to hold the plaintiff to the strict requirement of the statute to serve a copy of the complaint within the twenty days.

Motion granted, with $5 costs of this motion, with leave to the plaintiff to serve a copy of the complaint within five days, upon payment of such costs.

SUPREME COURT

Olssen agt. Smith

Where a temporay injunction is sought under the 3d clause of §219, the affidavit must show that the threats of the defendant to remove his property, &c., were made *during the pendency of the action;* and the complaint should contain a prayer for an injunction for that reason. The injunction order can not be sustained where it appears that the threats of the defendant were made *before* suit brought, and no demand in the complaint for an injunction.

New York Special Term, January 1852. *On return of order to show cause why injunction should not issue.* Complaint is sworn to on the 24th of January; summons dated on the same

day; affidavit on which order to show cause, is dated same day, 24th January.

E. F. TREADWELL, *for Plaintiff.*

——, *for Defendant.*

MORRIS, Justice.—The complaint does not aver that defendant threatened "he would put his property out of his hands, if plaintiff resorted to legal means to collect his claim." Neither is there a prayer in the complaint for an injunction.

The affidavit of the plaintiff upon which notice to show cause has issued, states:

"Deponent further says, that defendant has threatened, and still threatens to dispose of his property in case this deponent has recourse to legal measures to compel said defendant to pay deponent's just and lawful claim against him; and deponent verily believes that unless an injunction order be issued, &c., deponent will totally lose his just and lawful claim." It is not averred this threat took place during the pendency of the suit. Section 219, "Injunction, in what cases granted," first clause provides for cases where the facts upon which injunction should issue, exist before the suit is instituted, are set forth in the complaint, and a part of the relief asked for in the complaint, is the injunction.

Second clause is where during the litigation it shall appear that plaintiff is doing, or threatens, or is about to do, or procuring or suffering some act to be done in violation of the plaintiff's rights respecting the *subject* of the action, and tending to render the judgment inffectual, a temporary injunction may be granted, &c.

Third clause, where, *during the pendency* of an action it shall appear by affidavit that defendant "threatens, or is about to remove or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or dispositon." It is under this third clause that the injunction must issue if plaintiff is entitled to it.

The threats spoken of in the affidavit were evidently made before the suit was brought; and if urged as a reason for the injunction should have been charged in the complaint, and an injunction demanded in the complaint.

As the affidavit does not aver, and from the time it was taken, it could not aver, that the threats were made during the pendency of the suit, the injunction must be denied.

Injunction order vacated, with $10 costs to the defendant for opposing the motion.

SUPREME COURT.

CONKLIN AND OTHERS agt. VANDERVOORT

An unverified answer, consisting of denials only, may be stricken out as false. The power under the Code, extends to all answers or defences, whether they contain simply denials or new matter in avoidance.

Erie Special Term, February 1853. *Motion to strike out the defendant's answer as false.* The action is upon a note and an account for goods sold and delivered. The defendant, by his answer, denies each and every allegation in the complaint, and then, for a further answer, alleges that the plaintiffs, at the time of the sale of the goods promised the defendant that the goods, &c. were of a good quality, and not injured; whereas they were of a poor quality and injured and of no value to the defendant.

The pleadings were not verified. Affidavits of the plaintiffs and letters of the defendant, were read upon the motion. No papers were read in opposition to the motion.

POOL & LEWIS, *for Plaintiffs.*

E. THAYER, *for Defendant.*

MARVIN, Justice.—The papers read upon this motion are abundantly satisfactory to show that the defendant has no defence, and the question is, can the answer be struck out upon the ground that it is false? Prior to the Code the practice of striking out sham special pleas, was well settled; but this did not extend to the general issue simply (see *Gra. Pr.* 250; Brewster vs. Bostwick, 6 *Cow.* 34; Wood vs. Sutton, 12 *Wend.* 235, 223, 197; Broome Co. Bank vs. Lewis, 17 *Wend.* 565).

It is insisted by the defendant, "that an answer now which simply denies the allegations in the complaint can not be stricken

out as sham or false. That the same practice should be applied to such denial as was applied to the general issue under the former system of pleading. The old forms of pleading are abolished, and new forms and rules, by which the sufficiency of the pleadings are to be determined, are prescribed by the Code (§ 140).

The facts constituting the cause of action are now to be stated in the complaint; and the answer is to contain a general or specific denial of each material allegation of the complaint controverted by the defendant, &c. There is no longer any general issue in the sense and contemplation of the old practice. The answer is now a denial of the material allegations in the complaint or some of them. Under the old system the plaintiff alleged in his declaration that the defendant made his certain promissory note, describing it, and delivered it, &c., by means whereof he became liable to pay, &c., and being so liable, he in consideration thereof, afterwards, &c., undertook and promised to pay, &c.; and the general issue was that he did not undertake and promise in manner and form, &c. Here was no general or specific denial of any fact touching the making or delivery of the note; yet it put the plaintiff to the proof of his whole case. The present system of forming issues, rests upon principles widely different from the system superceded.

By the Code of 1848, all pleadings were to be verified, and the law contained no provision touching sham answers. By the Code of 1849, the complaint might, or might not, be verified; if not verified no verification was required to the answer; and in this revision of the Code, it was first provided that sham answers and defences may be stricken out on motion (§ 152). In the Code of 1851, the provision is "sham and irrelevant answers and defences may be stricken out on motion" (§ 152). The language is general, sham answers and defences; not simply sham answers containing a statement of *new matter*. It is clear that extends to an answer consisting of denials only; and this is the provision in accordance with the general system contemplated by the Code.

In Mier vs. Cartledge (4 *How. Pr. R.* 115), decided in October 1849, Justice EDMONDS struck out an answer containing a *denial* only of an allegation in the complaint. The answer was verified.

An appeal was taken to the general term, when the decision of the special term was reversed, upon the ground solely, that as the plea was *verified* as required by the Code, it ought not to have been stricken out as false upon motion. But it was very ably maintained that an answer false, though simply a denial of the allegations in the complaint, could and ought to be stricken out on motion (8 *Barb. S. C. R.* 75). The question is discussed upon general principles, and the general system of the Code, without adverting to the specific provision in the Code, first adopted in 1849, § 152. On referring to that provision it seems to me that it can not be doubted that the court now has, by statute, the power to strike out any sham or irrelevant answer, or defence. The power extends to all answers or defences, whether they contain simply denials, or new matter in avoidance. In the present case there is no pretence that the defendant has any defence. The answers were put in for delay, and they are stricken out with $10 costs.

SUPREME COURT.

JOHNSON agt. JILLITT.

The court has no authority to allow a provision to be inserted in an order, that the costs of a motion to change the venue abide the event of the suit, and that they be inserted in the bill of general costs at a specified amount, if the moving party is finally entitled to costs.

The Code does not authorize *motion costs* to be taxed and inserted in the judgment.

Monroe Special Term, January 1853. A motion to change the place of trial having been granted, the defendant's counsel asked for costs of the motion, the amount to be fixed and inserted in the order, with a provision that the defendant be allowed to insert them in his general bill, provided the final result should entitle him to recover judgment for costs against the plaintiff; in other words, that the costs of the motion be ordered to abide the event of the action.

B. W. FRANKLIN, *for Defendant.*
H. HUNTER, *for Plaintiff.*

WELLES, Justice.—I am aware that the practice has prevailed to some extent, of granting orders substantially as asked for in this case; but I am satisfied it has been without sufficient consideration. It has, I presume, grown out of a practice existing prior to the passage of the Code, and at a time when the costs were made up of specific items of services and disbursements, under the provisions of former statutes concerning costs. Where motion to change the venue was granted or denied upon the merits, the costs, as a matter of course, would abide the event (*Gr. Pr. 2d ed.* 566). No provision was necessary in the order, to enable the party ultimately entitled to recover his general costs against his adversary, and to tax the costs of the motion in his final bill; nor was it necessary or proper that the amount of such costs should be fixed and liquidated upon granting the motion. The fee bill had made all the necessary provisions for that purpose. I had occasion, in the case of Thomas agt. Clark and Rogers (5 *How. Pr. R.* 375), to consider the question in what class of motions the costs were to be taxed in the general bill, under the law and practice prior to the Code; and I attempted to show, that in all such cases, it was improper to liquidate the amount at the time the order was made. By the present Code, costs may be allowed on motion in the discretion of the court, not exceediug ten dollars (§ 315). When they are allowed, the amount must be determined, and inserted in the order; otherwise they can never be collected. When thus ordered, the party entitled may collect them forthwith, without waiting the final determination of the action. The discretion of the court is to be exercised upon the questions whether either, and which party shall pay the costs of the motion, and to what amount, not exceeding $10; and not as to when, or how, or in what event it shall be collected. Under the Code, costs of motion, as such, can in no case go into the judgment. Section 307, contains a specificaton of all the costs which a party can, in any event, have inserted in his judgment, excepting the extra allowances provided for in sections 308 and 309. The principle adopted, is to allow certain amounts in gross for certain periods of time, or stages, in the progress of the action, and certain specified sums for other particular services enumerated. For instance, to the defend-

ant, for all the proceedings before notice of trial, five dollars; for all subsequent proceedings before trial, seven dollars. Then allowances are made for the trials of issues, distinguishing between the plaintiff and the defendant; and ten dollars to either party in a certain case, for each circuit or term of the court, when the cause is necessarily on the calendar. It will be seen, therefore, that there is no possible way, in any case, to get a charge for motion costs allowed or taxed as part of the judgment, without a palpable violation of the statute.

In a case proper for an extra allowance, under sections 308 and 309, the fact that the party applying had properly made or opposed a motion to change the place of trial, or for a commission, or any other motion, where, by the practice of the court, he could not have costs of motion allowed when the order was granted, would be a legitimate consideration for the court in determining the rate or measure of such allowance.

I am satisfied the court has no authority to direct the provision in the order as applied for, and the motion is granted without it.

SUPREME COURT.

Browning and Hall agt. Paige and Allen.

A dismissal of the complaint, founded upon service of notice of trial or hearing, is irregular if obtained without placing the cause upon the calendar.

Washington Special Term, September 1852. This action was commenced in March 1846, and is in the nature of a creditor's bill. A large amount of testimony was taken, and various orders made enlarging the time, till on the 10th May 1847, an order was made on the application of the plaintiffs, to close the proofs, and notice served on defendants' attorney. On the 22d August 1847, an order was obtained by defendants' attorney opening the proofs, which was not served on the plaintiffs' attorney till the 20th February 1848. No steps appear to have been taken by either party after that time, until the October circuit in Wash-

ington county in 1851, when papers were put into the hands of Mr. Milliman, as counsel for plaintiffs, with instructions to agree upon and have a referee appointed to hear the cause; the plaintiffs' attorney believing the court would not hear it, as no order had been entered closing the proofs after the same had been opened by the order of defendants.

Mr. Milliman afterwards informed the attorney in Troy that a reference had been agreed upon, but that he had forgotten the name of the referee, but would write and inform him who he was. The plaintiffs' attorney swears that hearing nothing further, he (the attorney) supposed and believed a reference had been agreed upon until the 11th of June last, when he received a notice from defendants' attorney, that the cause would be brought "to *hearing and argument*, at a circuit court to be held at the court house in Sandy Hill in and for Washington county, on the 21st of June inst., at the opening of the court on that day.

On the 22d June, which was the 2d day of term, the plaintiffs' attorney went to Sandy Hill to attend court, and examined the calendar of causes, but the cause was not on it. He then inquired for Mr. Gibson, defendants' attorney, and found he was not in attendance; but he saw his partner, Mr. Davis, and asked him why the cause was not on the calendar, saying that they had made him come up from Troy for nothing. Mr. Davis replied, "he thought you would want to come up into the country," or words to that effect; and further said that Mr. Gibson, who resided at Whitehall, had not yet come to court. The attorney, under these circumstances returned home, believing that as the cause was not on the calendar nothing would or could be done, in the matter. He supposed nothing had been done, until the 29th of June, when he was served with a copy of an order by defendants' attorney dismissing the complaint, with costs. Not understanding the matter, he wrote to the clerk of Washington county to ascertain what had been done, and received from the clerk a copy of an order, made on the 24th June, dismissing the complaint. The plaintiffs' attorney swears he has always been desirous of trying the cause, and of taking more testimony in it, and wished it to be referred for that purpose.

The defendants' attorney swears that he was not aware of the

interview between Mr. Davis, his partner, and plaintiffs' attorney, tiil apprised of it by his affidavit; that the cause has never been referred by any agreement on his part, with Mr. Milliman, or any one else; that several terms have elapsed, at either of which this motion could have been made, and that plaintiffs have been guilty of laches.

J. A. MILLARD, *for the Motion.*

H. GIBSON, *Contra.*

C. L. ALLEN, Justice.—1. The alleged irregularity of defendants appear in the affidavit served, and the several papers annexed, and the error complained of is sufficiently indicated in those papers (Blake agt. Locey 6 *How. Pr. R.* 108). The new rule (25) did not go into effect until the first day of October, after the notice of this motion was served.

2. Neither do I think the plaintiffs have been guilty of such laches, as form a sufficient objection to their making this motion at the present time. Notice of the order obtained by defendants was not served until the 29th of June last, and the attorney believing there was some mistake in obtaining it, from the facts stated in his affidavit, wrote to the clerk of Washington county, and did not obtain a correct copy of the order until the 20th of July, too late to prepare papers and move for any special term before the present, even from the first service. The general term in September, was not the place for hearing motions of this kind, and this being the county where the place of trial is designated, would seem to be the proper one for making the motion.

3. The defendants were irregular in taking an order to dismiss the complaint, not having placed the cause on the calendar, in pursuance of their notice (*Code*, § 256, 258). It does not appear from the papers that the cause was placed on the calendar at all The plaintiffs' attorney attended court the second day of the circuit, and not finding the cause on the calendar, and being induced to believe by the partner of defendants' attorney, that there was no intention to move in the cause, returned home as he had a right to do, under the circumstances. He was clearly misled, and the order should be set aside. If defendants had chosen, they might have taken the other course, by motion to dismiss the

complaint for the want of notice of hearing by plaintiffs. But they elected to take another remedy, and must be confined to the practice by which it is regulated.

The order dismissing the complaint must be set aside, the costs of this motion to abide the event of the suit.

SUPREME COURT.

MITCHELL agt. HALL.

Notice of an application for an extra allowance of costs (§ 308) is not necessary where the judge who tries the cause, makes the order at the same term.

The old practice of perfecting judgment and then giving notice of retaxation of costs can not now be pursued. The clerk has no authority under the Code, to adjust the costs until the notice (two days) required by § 311 has been given.

An order of a justice made out of court, without notice, staying proceedings more than twenty days, is good for *twenty days only*.

The best course is to make the first order *an order of the court*, which gives it vitality commensurate with the necessities of the case.

Brooklyn Special Term, January 1853. This cause was tried at the Westchester circuit in September 1852, by Mr. Justice PARKER, and a verdict rendered for the defendant. The next day after the verdict was rendered, the justice made an extra allowance of $50. The plaintiff made a bill of exceptions, and on the 6th day of November obtained and served an order in the following terms. "On the service of the bill of exceptions or case in due time, let all proceedings be stayed until the settlement thereof and the decision of the court thereon.

Dated Nov. 6, 1852. A J. PARKER."

The exceptions were settled on the 7th December; but owing to some miscarriage of the papers sent by mail, the bill has not been filed. On the 5th January 1853, the defendant had his costs adjusted by the clerk, and perfected his judgment for the sum of $128·15; and immediately gave notice of readjustment. The plaintiff now moves to set aside the judgment &c., for irregularity.

WM. SILLIMAN, *for Plaintiff*
J. J. CLAPP, *for Defendant.*

BARCULO, Justice—The plaintiff moves upon these grounds:

First. He contends that the extra allowance could only be made *on notice.* In this he is mistaken. When the allowance is made by the judge who tries the cause, at the same term, notice is not necessary; nor need the party against whom it is made be present in court. It is usual, so far as my experience goes, to ask for it when the verdict comes in, and for the judge to grant it then or during the circuit, without hearing counsel. It would be intolerable if a judge were bound to listen to affidavits and arguments upon every such question that arises. When the cause is tried before him, he obtains all the information from the trial itself which can be of any value on the subject.

Second. It is claimed that the defendant is irregular in having his costs adjusted and entered in the judgment *without notice.* In this proposition I think the plaintiff is correct. The old practice of perfecting judgment and then giving notice of retaxation, can not obtain under the Code. Section 311 authorizes the clerk "to insert in the entry of judgment on the application of the prevailing party, *upon two days notice to the other,* the sum of the charges for costs." This is all that confers any power on the clerk; and it seems to me just as clear that he has no authority to adjust the costs until the notice is given, as it is, that he is authorized when this provision has been complied with. The distinction between a statute and a rule of practice is well recognized. The latter may be moulded into different shapes, to suit emergencies; but the former is inflexible, and demands implicit obedience. This principle seems to have been lost sight of in some of the cases. The true rule is laid down by Justice BOSWORTH, of the Superior Court, in Gilmartin vs. Smith (4 *Sandf. S. C. Rep.* 684). The proceedings of the defendant are irregular, therefore, in this particular.

Third. The plaintiff insists that the defendant had no right to disregard the order of Judge PARKER, although it extended more than twenty days. This is a question not without its difficulties. The last paragraph of section 401 of the Code seems to be im-

perative in prohibiting an order staying proceedings more than twenty days out of court, except upon previous notice. It does not, however, distinctly appear whether any notice was given on obtaining this order or not. The silence of the papers and the form of the order, lead to the conclusion that it was *ex parte*. The order was of course valid on its face, and good for the twenty days; but I am inclined to doubt whether it could extend beyond that. If that time did not prove sufficient, the plaintiff should have obtained another order. The safest and best practice undoubtedly is, when the first order is applied for, to make *it an order of the court*, which will give it a vitality commensurate with the necessities of the case.

Upon the whole, I shall direct the adjustment of costs and all subsequent proceeding to be set aside; the plaintiff to be permitted to file his exceptions within ten days; and a stay of proceedings until the cause is heard and decided. And as the defendant has been irregular, and the plaintiff guilty of laches, neither party is to have any costs of this motion,

SUPREME COURT.

Isaac Hodgman agt. The Western Rail Road Corporation.

No authority is given by the Code to assign a *right of action*, which before was not assignable.

A right of action for personal injuries received by a collision of cars upon a Rail Road, is not assignable. The right to compensation or damages for such an injury can not be transferred. The action can only be maintained by the party who has been injured.

It is otherwise where the injury affects the *estate* of a party rather than the *person*.

Albany Special Term, November 1852. *Demurrer.* The plaintiff alleges that, on the 29th of October 1847, the defendants, for certain reasonable reward to them paid, undertook, as common carriers of persons and property, to carry and convey Amanda A. Hodgman from Worcester to Albany, and that she

then became a passenger on the defendants' cars, whereby it became the duty of the defendants safely and securely to carry her from Worcester to Albany, and to use all care and prudence in so doing. That while the said Amanda was so a passenger on the defendants' cars, the train, through the carelessness of the defendants, came in collision with another train moving in an opposite direction, by reason of which she was greatly bruised, wounded and injured in her chest and other parts of her body, and became, by reason thereof, sick and disabled and unable to attend to her business, and so continued for a long time, and has ever since suffered great pain and distress of body; and that she was compelled to expend large sums of money in and about endeavoring to be cured of her pain, sickness and disability. The complaint then states that Amanda Hodgman, on the 28th of December 1850, assigned her right of action against the defendants to the plaintiff, with power to collect, for his own use and benefit, whatever damages she may have sustained, or which may be awarded or adjudged to her for the injuries she had received. By reason whereof the plaintiff claims judgment against the defendants for the sum of ten thousand dollars.

The defendants demurred to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action, in favor of the plaintiff against the defendants; and they specify, as the particular cause of demurrer, that the cause of action set forth is not assignable so as to vest a right of action in the assignee.

S. H. Hammond, *for Plaintiff.*

Dexter Reynolds, *for Defendants.*

Harris Justice.—At common law, no mere right of action was so assignable as to pass the *legal* right of the assignee—when it affected the *estate* of the assignor, though the legal right still remained in the assignor, so that the action must be prosecuted in his name, the court exercising its equity powers, would protect the rights of the assignee. The only change made by the Code, in this respect, is to transfer, with the beneficial interest, the right of action also, in those cases, where before the court would recognize and protect the rights of the assignee. No new

right of action is created; no authority is given to assign a right of action which before was not assignable.

When the right of action is of such a nature as not to be the subject of a contract, as in the case of a violation of personal or relative rights, it can not be assigned. The action can only be maintained by the party who has been injured, and when he dies the right of action also dies. Every right of action involving life, health or reputation, belongs to this class. So a right of action, founded upon a breach of promise of marriage, being in its nature a personal injury, can not be transferred. On the other hand, where the injury affects the *estate* rather than the *person*, where the action is brought for damage to the estate, and not for personal suffering, the right of action may be bought and sold. Such a right of action upon the death, bankruptcy or insolvency of the party injured, passes to the executor or assignee, as a part of his assets, because it affects his estate, and not his personal or relative rights. Of course, such a right of action is assignable, and, under the provisions of the Code, the assignee is the proper party to maintain the action upon it (The People vs. Tioga Common Pleas, 19 *Wend.* 73; 1 *Chitty's Pl.* 68; Chamberlain vs. Williamson, 2 *Maule & Sel.* 408; Robinson agt. Weeks, 6 *How. Pr. R.* 161; Flynn agt. The Hudson River Rail Road Co. 6 *id.* 308; Comeggs vs. Vasse, 1 *Peters* 213). In the latter case, STORY, J., says: "In general, it may be affirmed that mere personal *torts*, which die with the party, and do not survive to his personal representative, are not capable of passing by assignment; and that vested rights *ad rem* and *in re*, possibilities coupled with an interest, and claims growing out of and adhering to property, may pass by assignment."

In this case, the injury which constitutes the gravamen of the complaint was personal. The plaintiff, as assignee, seeks to recover damages for the personal suffering of another. The injury set forth in the complaint had no reference to the estate of the party injured. It merely affected her health and personal comfort. The right to compensation or damages for such an injury can not be transferred. It is, from its very nature, inalienable. The defendants must, therefore, have judgment upon the demurrer.

WAYNE COUNTY COURT.

Bailey and Sherman agt. Easterly and Easterly

A *motion to strike out* a codefendant, where the defendants are improperly joined in the action, is the proper remedy where the misjoinder is not apparent upon the face of the complaint. If apparent a *demurrer* would be the remedy.

May Term, 1852. The plaintiffs, Bailey and Sherman, sue the defendants on a contract executed by them in March 1851. The defendant, Silas Easterly, before answering the complaint, moves upon affidavits, showing that Sarah Easterly is his wife; that her name be stricken from the summons and complaint. The remaining facts appear in the opinion of the court.

John T. Mackenzie, *for the Motion.*
W. H. Hecox, *Contra.*

Ketchum, County Judge.—This is an action brought against husband and wife on a contract executed by both. The wife has no interest in the subject matter of the action, and it is conceded she is improperly made a party to the action. This is a motion by the defendant Silas Easterly, the husband, to strike out the name of the wife from the summons and complaint. The only question is whether the error may be corrected by motion on the part of one defendant to strike out the name of a codefendant improperly joined in the action.. Under the old system a defect or irregularity of this kind might have been taken advantage of if apparent on the pleadings, by demurrer, or made the ground of a motion in arrest of judgment, or by a writ of error; and if not apparent on the pleadings it would have been grounds for a nonsuit at the trial. And under the Code, if apparent on the face of the complaint, the husband might doubtless demur for the misjoinder. In this case it can hardly be said to be apparent on the face of the complaint, for there is no allegation in the complaint that the parties are husband and wife, and the recital of the contract only gives its substance and omits that part describing the defendant Sarah Easterly, as the wife of the other codefendant. The question then is, should the defect have been set up in the answer? Perhaps the husband might have answered it and taken advantage of it at the trial; but what would have

become of the defence of the wife meanwhile? A judgment would have been perfected against her by default, and how is she to get rid of it?

In Brittan vs. J. M. Wilder and Mary Wilder (6 *Hill*, 242), judgment having been entered on a warrant of attorney executed by both, and execution issued, Mary being the wife of the other defendant, the court set aside the judgment and execution as to the wife, on motion; and numerous other cases are cited by the court, BRONSON, J., in support of the right to do this.

Suppose, then, that the husband had set up the misjoinder by answering, and the wife had been defaulted (as far as she might be), and judgment entered against her, then the appropriate way of obtaining the relief sought by this motion would have been (according to the case of Brittan vs. Wilder) to move to set it aside; and I can see no good reason why the same relief may not be granted before answer, that would be after judgment. It then becomes a question of time only, and not a mode of remedies.

It seems to me that the wife could make no appearance so as to save a default, and I see no difficulty in this position growing out of the provisions of section 148 of the Code. The law was as well settled which defined the remedy in ordinary cases of a misjoinder of defendants at the time (and before) the case of Brittan vs. Wilder, as though it had been a statutory provision; and that section of the Code, I think, is not intended to cut off any remedy by motion which could before have been made the subject of a motion, and for which it provides no other new remedy. Any error or irregularity in practice in an action may as well be corrected by motion now as before the adoption of the Code; indeed, the design of the Code is to open new remedies and put those within the reach of suitors which were prior to its adoption beyond their reach; and it would be quite too rigid a construction to so interpret it as to deny to a party a remedy by motion for which no other remedy is provided, and I see no other way to correct the error in this case so as to make it operative as to the wife, except by motion, either before or after judgment. I think, therefore, the motion must be granted with five dollars costs, and if the defendant has not answered in the action, let him have fifteen days in which to answer.

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ABATEMENT, in an action to recover the possession of land, the death of a sole defendant abates, and it can not be continued against his heirs at law, as his successors in interest. *Putnam agt. Van Buren*, 31.

If the heirs be infants, out of possession and do not ask to be substituted, they can not be substituted on motion of the plaintiff. *id.*

Where the plaintiff obtained a verdict and the defendant appealed to the general term, and pending the appeal, died, the personal representatives should be allowed to be made parties, on their own motion, in reference to a further appeal. *Miller agt. Gunn*, 159.

See REVIVAL. *Ridgeway agt Bulkley*, 269; *Greene agt. Bates*, 296.

ACTION, where a summons has been served on only one of two defendants, who are severally as well as jointly liable, the plaintiff may proceed against the defendant served, as if he were a sole defendant; otherwise, if the defendants are liable jointly and not also severally. In the latter case the judgment must in form, be entered against both defendants. *Stannard agt. Mattice*, 4.

Where several causes of action are improperly joined, the remedy is by demurrer and not by motion to set aside the complaint. *id.*

The Code has not changed the common law rule of pleading so as to deprive the party of the right to waive the tort and bring an action on the contract. *Hinds agt. Tweddle*, 278.

Where the plaintiff could have brought an action in tort against the defendants as bailees, but counted in contract, *held* no misjoinder by connecting such a count with one clearly in contract. *id.*

on guaranty of payment, see GUARANTY, 316.

A complaint to compel defendants to pay over a surplus received on a mortgage collateral to notes, and also to require the delivery of the notes is one entire cause of action and no misjoinder. *Cahoon agt. The Bank of Utica*, 401; *reversing S. C.* 134.

originating in a Justice's Court, see ANSWER, JUSTICE'S COURT, 402, 404.

In partition there is no misjoinder of actions because a claim is set up of one of the defendants to a specific lien for moneys paid to extinguish liens, and an account thereof is asked. *Bogardus agt. Parker*, 305.

Digest.

ADMISSION, see EVIDENCE, 94, 113.

AFFINITY, the relation of cousin, between the wife of a commissioner to appraise rail road damages and one of the stockholders, is not a disqualifying affinity, no unfairness being shown. *Albany Northern Rail Road Co. agt. Cramer*, 164.

AGENT, see EVIDENCE, 94.

AGREEMENT, declared void, for indefiniteness, uncertainty and gross inadequacy of consideration. *Smedes agt. Wild*, 309.

Interest allowed on the loan of money, where a chattel mortgage given to secure its repayment was silent as to interest. *id.*

Agreement for the purchase of lands where a right of resale was given on the non payment of the purchase money, declared to be a mortgage. *Davis agt. Garr, adm'r &c.*, 311.

AMENDMENT, by the amendment of § 173 (in 1852) the restriction of amendments to pleadings to such as would not change substantially the claim or defence, is now limited to cases of amendment to conform the pleading to the facts proved, on or after trial. *Beardsley agt. Stover*, 294.

Not allowed where the defence sought to be set up is clearly untenable, nor after *laches*. *Davis agt. Garr, adm'r &c.*, 311.

A pleading which does not admit of an answer can not be amended, of course, under the 172d section. *Plumb agt. Whipples*, 411.

The right to amend where it exists, is not to prejudice the proceedings already had, and an amended answer can not be served after an inquest taken regularly at the circuit, though within twenty days. *id.*

Where a judgment was docketed incorrectly as to the initial of the middle name only, and the docket was corrected on motion. *Held* that the judgment took priority from the date of the original docketing. *Geller agt. Hoyt*, 265.

The court has full power to order an amendment of a judgment record as of the day the record was filed. And no notice is necessary to be given to the other judgment creditors of the defendant. *Mann agt. Brooks*, 449.

ANSWER, which denies on oath that the defendant "has any knowledge or information sufficient to form a belief that the payee endorsed and delivered the note to the plaintiff," intended to meet a corresponding allegation in the complaint, is a material part of the issue, and good. *Sherman agt. Bushnell*, 171.

It can not be stricken out as sham because it is sworn to and there is no new matter set up. *id.*

Where a pleading is served, regularly and within the proper time, though defective, it can not be returned and disregarded as a nullity. *Strout agt. Curran*, 36.

Digest.

ANSWER, an answer which states that the defendant did not do the precise act at the precise time, *and* in the particular place *and* manner stated in the complaint, is bad as containing a negative pregnant. *Salinger agt. Lusk*, 430.

It is not equivalent to the general issue as formerly understood. *id.*

It seems, that now the courts *might* sanction the old form of pleading the general issue. *id.*

Where the plaintiff requires a verification he is entitled to have the answer drawn with legal certainty and precision. *id.*

An unverified answer consisting of denials only, may be stricken out as false. *Conklin agt. Vandevoort*, 483.

See DEMURRER, 57, 430. AMENDMENT, 411.

ANSWER OF TITLE, in an action where the title to real property was put in issue by the pleadings, and the jury found the title for defendant, but that the plaintiff recover a small sum for some personal property. *Held*, that plaintiff was not entitled to costs. *Burhans agt. Tibbits*, 74.

It is not necessary (in the Court of Appeals) that the record should show the identity of a suit commenced before a justice with that commenced in the Supreme Court, where title to land is pleaded before the justice. It may be shown by affidavit. *Pugsley agt. Kesselburgh*, 402.

Where the suit in the Supreme Court is so situated that the plaintiff on recovering less than $50 would be entitled to full costs, even if title did not there come in question, it must be held to have originated in a Justice's Court, and the Court of Appeals have no jurisdiction. *id.*

Where the defendant does not give a written admission of service, pursuant to § 56, but puts in his answer in the Supreme Court, *held* a substantial performance, and the suits before the justice and in the Supreme Court are identical. *Wiggins agt. Tallmadge*, 404.

The answer in the court above need not be in the identical words of that before the justice, but only the same substantial defence. *id.*

And in the Supreme Court, he may abandon part of his defence before the justice. *id.*

When the suits are identical the Court of Appeals has no jurisdiction on appeal. *id.*

An affidavit to dismiss an appeal on such ground must show that the justice was ousted of jurisdiction by the giving of the undertaking required by § 56. *Lallictte agt. Van Keuren*, 409.

APPEALS, see COURT OF APPEALS.

Two modes of proceeding to obtain a review of a trial, are prescribed. The one is applicable exclusively to trials by jury; the other to trials by the court or by referees. In case of trials by jury, the review must first be had *before* judgment at the circuit or special term for a

new trial; and this decision reviewed on appeal at general term. In case of trial by the court or referees, either upon questions of fact or of law, no review can be had until *after* judgment, and then only upon appeal. *Watson agt. Scriven*, 9.

ANSWER, see REFEREE, 251.

A report of a referee will not be set aside as contrary to the evidence unless there is a decided preponderance of evidence against it. *Shuart agt. Taylor*, 251.

from a justice of the peace. On appeal from a justice's judgment, the court have no power to reverse such judgment on mere questions of fact upon the evidence. *Adsit agt. Wilson and Chamberlain*, 64.

The term "*error of fact*" in § 366, does not refer to any error of the justice or jury in finding the facts. *id.*

When the appeal is founded upon some irregularity or error not contained in the proceedings before the justice, such error must appear by the appellant's affidavit, which is in such case equivalent to *an assignment of errors of fact*. *Lynch agt. McBeth*, 113.

On appeal from a justice, the County Court has no jurisdiction unless the notice of appeal be served on the respondent and justice both, within the twenty days prescribed. *People ex rel. Gemmill agt. Eldridge*, 108,

This is a jurisdictional question which can be taken advantage of at any time until some positive act of submission to the jurisdiction questioned. *id.*

A verbal notice of appeal amounts to nothing. It must be in writing. *id.*

No amendment can be allowed in such case. The court has no authority to allow an appeal to be brought after the time limited by statute has expired. *id*

The Supreme Court exercises on an appeal from a County Court in a cause originating in a Justice's Court, merely appellate jurisdiction and can review only decisions actually made by the County Court. *Lynch agt. McBeth*, 113.

When the return of the justice does not contain any legal evidence to support his judgment, the judgment should be reversed. *id*

See ANSWER OF TITLE.

from Surrogate. It seems, that appeals from all decrees or sentences of surrogates should be first heard at general term. *Wever agt. Marvin*, 182.

from orders. An order made at special term, allowing final costs, *is* appealable to the general term. *Burhans agt. Tibbits*, 74.

An order granting an *extra allowance* of costs and costs of motion is *not* appealable. *Dickson agt McElwain*, 138.

An order *granting a new trial* is *not* appealable, though brought previous to and pending when the act which abrogated such appeals was passed. *Gale agt. Wells*, 191; *Porter agt. Jones*, 192.

A judgment of the Supreme Court affirming an order of a surrogate denying a motion for leave to discontinue proceedings of accounting

and directing the proofs to be closed, is not one which can be appealed to the Court of Appeals. *Tompkins agt. Soulice*, 194.

ANSWER, *time to.* The two years limitation by the statute, for bringing an appeal, begins to run from the date of the entry of the order for final judgment in the court below. *Wells agt. Danforth*, 197.

Service by mail gives double time to appeal, 132.

Security on. On bringing an appeal from a judgment on a report of referees or decision of a single judge, to the general term, no security need be given except for the purpose of staying proceedings. *Dorlon agt Lewis*, 132; *Ten Broeck agt. Hudson River Rail Road*, 137.

generally. In an equity suit commenced before the Code. *Gilchrist agt. Stevenson*, 273,

The practice under § 268, considered. *id.*

See EXCEPTIONS, 273.

See INJUNCTION, 140.

See PLANK ROAD LAW, 301.

APPEARANCE, waives irregularity in the process by which the party is brought into court. This rule qualified. *Voorhies agt. Scofield*, 51. *The People ex rel Gemmill agt. Eldridge*, 108.

One of several defendants who has not been served with a summons and complaint, can not voluntarily appear and move to dismiss the complaint, when his rights are not affected. *Tracy agt. Reynolds*, 327.

Where notice of appearance is served after the time for answering has expired, the plaintiff is not bound to delay entering his judgment for the purpose of giving notice of assessment. *White agt. Featherstonhaugh*, 357.

APPLICATION *for judgment*, see COSTS. 97.

APPRAISAL of Rail Road damages. The Rail Road act, passed April 2, 1850, does not give the court power to set aside the report of commissioners of appraisement upon *motion*, but only on *appeal*. *Albany Northern Rail Road agt. Cramer*, 164.

ASSIGNEE, see PARTY. 79, 268.

ASSIGNOR, the assignor of a thing in action shall not be admitted as a witness on behalf of his assignee, unless ten days notice of such intended examination be given. *Knickerbacker agt. Aldrich*, 1.

ASSIGNMENT, where a judgment creditor, has, by sale under his judgment, taken a sheriff's deed of premises subject to a prior mortgage, he is entitled to pay off and cancel the mortgage, but is not entitled to an assignment of the mortgage as a matter of course, without showing affirmatively and clearly that such assignment is necessary to protect his title. *Dauchy agt. Bennett*, 375.

An assignment for the benefit of creditors which authorizes the assignees to sell and dispose of property *upon such terms and conditions as*

in their judgment shall appear best, &c., Held good, for it merely authorizes the assignees to do what the law imposes upon them as a duty. *Southworth agt. Sheldon*, 414:

And a provision which directs *that the surplus after paying the preferred debts, shall be paid pro rata to all the other creditors*, does not render the assignment invalid. *id.*

A right of action for personal injuries received by a collision of cars upon a railroad, is not assignable, since, as it was not before, the Code. *Hodgman agt. The Western Rail Road*, 492.

Otherwise where the injury affects the *estate* of a party rather than the person. *id.*

ATTACHMENT, the provisions of the Code relating to attachments are applicable to one of several joint debtors; but the statute does not authorize the joint property of several defendants to be seized upon an attachment against one. It is only his individual interest that is liable to such seizure. *Stoutenburgh agt. Vandenburgh*, 229

The court acquires jurisdiction of the action from the time of the allowance of the warrant of attachment. *Burkhardt agt. Sanford*, 329.

When the warrant is issued, irregularities in the service of the summons or in perfecting the judgment will not vitiate the judgment, unless taken advantage of by motion. *id.*

In an action for the recovery of money, so commenced, the plaintiff acquires no lien upon the land of defendant by filing notice of the pendency of the action. *id.*

Utility of such notice in attachment cases. *Learned agt. Vanden burgh*, 379.

The creditor's lien upon the property by attachment, attaches upon the levy or seizure of the property, whether the latter be real or personal. *id. ibid*, 329, 379.

An application to set aside an attachment as improvidently issued, must be founded and depend upon the affidavits upon which the original application was made. *White agt. Featherstonhaugh*, 357. *Bank of Lansingburgh agt. McKie*, 360

See FOREIGN CORPORATIONS, 238.

ATTORNEY, where the party is not within the county in which the attorney resides, the attorney may verify a pleading, though the action be not on a written instrument, and though all the material allegations may not be within the knowledge of the attorney. But in such case the attorney must set forth his knowledge or grounds of belief, and the reasons it is not made by the party. *Stannard agt. Mattice*, 5. *Roscoe agt. Maison*, 121.

The death of the party revokes the appointment of his attorney. *Putnam agt. Van Buren*, 31.

On the substitution of attorneys it is only necessary to serve the adverse attorney with a written notice of the fact. *Dorlon agt. Lewis*, 132.

Digest.

ATTORNEY-GENERAL, in an action brought by the attorney-general to try the right to a public office, his written stipulation in the progress of the cause, binds the individual claiming the office. *Matter of Welch agt. Cook*, 173.

BANKS AND BANKING LAW. *People agt. Metropolitan Bank*, 144.

BAIL, bail in an action, who have been excepted to and do not justify, can surrender the defendant to the sheriff.

It seems that such surrender can be made by any one of the bail. *In re Henry M. Taylor*, 212.

See SURETIES.

BILL OF EXCEPTIONS, see EXCEPTIONS.

BOOKS AND PAPERS,

An application by petition may be so framed as to embrace a discovery under the Code, and the production of papers under the rules. *Lovell agt. Clarke*, 158.

A defendant is entitled to an injunction and copy of an assignment of plaintiff's bond made under an order of the court, and of the order. *id.*

See PUBLIC OFFICE, 173, 282.

A *subpœna duces tecum*, addressed to a *party*, can not compel him to produce books or papers. *Trotter agt. Latson*, 261.

BROOKLYN, assessments in, 198.

BURIAL PLACE, the grant of lots in a burial ground by a religious corporation, is in subordination to the right of the corporation, upon complying with the statute and by leave of court, to sell the property and remove the remains of the dead. *Matter of the Reformed Presbyterian Church*, 476.

CERTIORARI, common law,

On a common law certiorari to review a special proceeding, the Supreme Court will only determine whether the inferior tribunal has kept within its *jurisdiction* and proceeded regularly. *Haviland agt. White*, 154. *Semble contra*, *Carter agt. Newbold*, 166.

See COSTS 154.

CHALLENGE TO JURORS, the public prosecutor, on the trial of an indictment, is not entitled to any peremptory challenge of jurors. *The People agt. Dickinson*, 241.

CHATTEL MORTGAGE, see MORTGAGE, 251.

Digest.

CLOUD UPON TITLE, the courts of equity deny relief to a party seeking the aid of court to remove a supposed cloud upon his title, whenever it is apparent upon the face of the proceedings, from which the adverse claim is derived, that the law adjudges such claim to be ineffectual. *Ward agt. Dewey*, 17.

COMPLAINT, where no valid cause of action is alleged, it is fatal in every stage in which the question can properly arise. *Noxon agt. Bentley*, 316.

If the complaint is bad, the defendant is entitled to judgment, though his answer be demurred to and the demurrer sustained. *id.*

See ACTION, PLEADING, JOINDER OF ACTIONS.

CONFESSION OF JUDGMENT, it is *not* a sufficient compliance with § 383 of the Code, to describe in the statement of confession, a promissory note, without setting out the consideration of the note. *Plummer agt. Plummer*, 62.

The above dissented from. *Mann agt. Brooks*, 449; *Whitney agt. Kenyon*, 458.

Nor is a statement sufficient whereby the defendant confesses and authorizes a judgment for a certain sum, and adds, "this confession of judgment is for a debt justly due to the plaintiff," without any thing further in regard to the debt. *Schoolcraft agt. Thompson*, 446.

Another instance of a statement of confession held insufficient. *id.*

Whether it is a sufficient verification, for the defendant to make affidavit that the *facts* stated in the above *confession* are true. *Quere. id.*

A judgment entered upon an insufficient statement and affidavit, will be regarded as fraudulent and void, as to junior judgment creditors, *id. ibid.* 62, 446.

Contra. *Whitney agt. Kenyon*, 458; *Mann agt. Savage*, 449.

One of two partners or joint debtors can not confess judgment for both. Such judgment is probably valid against the party signing, but is void against the other defendant, *and can not be enforced against the joint property. Stoutenburgh agt. Vandenburgh*, 229.

In effect the party confessing, makes the debt his individual debt. *id.*

A public officer who is liable to be sued for services rendered for the public at his request, may confess judgment in his official capacity for the amount. *Gere agt. Supervisors of Cayuga*, 255.

The supervisors of the county may go behind the judgment to inquire whether the cause of action was a county charge. *id.*

CONTRACT, see AGREEMENT, 309.

CORPORATION, a forfeiture of the charter of a corporation can not be alleged, nor the question of forfeiture considered, upon a collateral proceeding. Judicial proceedings and a judgment of ouster must be had to effect a dissolution. *Matter of the Reformed Presbyterian Church*, 476.

See BURIAL PLACE. *id.*

Digest.

COSTS, when a constable is prosecuted for executing a warrant for a military fine, and obtains judgment against the plaintiff, he shall recover *treble* costs. *Walker agt. Burnham*, 55.

The cases holding that double and treble costs are *not* repealed by the Code collected and approved. *id.*

The words *treble* costs in the militia statute are to be understood literally, and the costs are to be *actually trebled*. *id.*

Where the defendants were public officers and entitled to *double costs* on the final determination of the suit, they could not claim double costs of amendment, upon the decision of a demurrer allowing plaintiff to amend on payment of costs. *Saratoga and Washington Rail Road agt. McCoy*, 190.

See ANSWER OF TITLE, 74.

The application for judgment on account of the frivolousness of the answer, is not a *trial*; it is more analagous to the application for the relief demanded in the complaint, and plaintiff is only entitled, under the 307th section, to $12 costs. *Gould agt. Carpenter*, 97.

The plaintiff may also be allowed the *costs of a motion*, whether the application be made in court or to a judge out of court. *id.*

It seems that if the application fails, the party whose pleading is sustained will be entitled to costs of defending it. *id.*

Extra allowance, see APPEAL, 138.

" " an extra allowance can be allowed only on a *judgment*. Where an extra allowance was granted on plaintiff obtaining a report of referees, and defendant obtained a new trial "on payment of the costs of the reference." *Held* that he was not required to pay the per centage allowed. *Hicks agt. Waltemire*, 370.

Whether the clerk can adjust interlocutory costs, *quere*? *id.*

Notice of application for an extra allowance is not necessary when the judge who tries the cause, makes the order at the same time. *Mitchell agt. Hall*, 490.

The travel fees of a witness residing out of the state, must be estimated by the number of miles he travels from the state line to the court. *Hinds agt. Schenectady Insurance Co.*, 142.

On a common law certiorari from a summary special proceeding, costs in the Supreme Court may be allowed. *Haviland agt. White*, 154

Where administrators successfully litigate a claim against the estate, *referred under the statute*, they are not entitled to an additional allowance, nor to any costs but disbursements. *Quere*? Whether costs can be allowed in such case under the old fee bill. *Van Sickler agt. Graham, adm'r, &c.*, 208.

Nothing can be allowed in the costs for payments to a commissioner for executing a commission to take testimony out of the state. *Perry agt. Griffin*, 263.

See OFFER, 161, 324.

on Demurrer. Where a demurrer is interposed to the complaint, it becomes necessary for the plaintiff to apply to the court for judgment,

and therefore becomes a trial by §252. The attorney's fees in such case of $12 before trial, $7 after trial, $15 on the trial, and $1 clerk's fees, is properly allowed. *Lawrence and another agt. Davis*, 354.

COSTS, a motion for judgment on account of the frivolousness of the demurrer (§ 247), *is the trial of an issue of law;* and a determination upon it is a *judgment*. The prevailing party is therefore entitled to the *costs* taxable for a *trial* (some $23). *Roberts agt. Morrison*, 396.

The court has no authority to allow a provision to be inserted in an order that the costs of a motion to change the venue abide the event of the suit, and that they be inserted in the bill of general costs at a specified amount, if the moving party is finally entitled to costs. *Johnson agt. Jillett*, 485.

The Code does not authorize *motion costs* to be taxed and inserted in the judgment. *id.*

The old practice of perfecting judgment and then giving notice of retaxation of costs can not be pursued. The clerk has no authority under the Code, to adjust the costs until the notice (two days) required by § 311 has been given. *Mitchell agt. Hall*, 490.

COUNTER CLAIM, where a plaintiff elects to reply, he can not on a question of verification, deny that he was bound to reply. And can not allege as a reason that the answer does not set up a *counter claim*. What is a *counter claim*? *Roscoe agt. Maison*, 121.

It seems, that the second subdivision of § 150, as amended, changes the law of set off, so as to allow a defendant to set up any counter claim arising on contract, whether it would have been admissible under the former law of set off or not; and even though the plaintiff's claim be one against which a set off could not have been formerly interposed, provided the action is upon contract. *Beardesley agt. Stover*, 294.

A widow's claim for dower of real estate is not subject to a set off for damages, nor for moneys due, nor for the receipt of rents and profits of the whole of the lands in which she claims dower.

Nor, where *she* claims no damages, can such set off be interposed as a 'counter claim' under the Code.

The counter claim allowed by the Code in an action not arising on contract, must arise out of the transaction set forth in the complaint as the foundation of the plaintiff's claim or be connected with the subject of the action. *Bogardus agt. Parker*, 303.

COUNTY CLERK'S office, see RECORDS,

COURT OF APPEALS, see APPEAL, 191, 192, 194.

Miscellaneous practice in, 240.

Unless the respondents can show some delay or inconvenience in not making the return in pursuance of Rule 2, or not serving the cases as required by Rule 7, the defaults taken under those rules should be relieved against upon terms, in all cases where it appears that the

appeals are brought in good faith. *Van Epps agt. Van Epps*, 407.

See ANSWER OF TITLE.

After argument and judgment, it is too late to alter a bill of exceptions in the cause. *Fitch and others agt. Livingston & Flanagan*, 410.

A bill of exceptions is bad for want of particularity, which says "To which charge the defendant's counsel excepted." *id.*

CREDITOR'S BILL, the 299th section of the Code is confined in its operation to cases where proceedings supplementary to execution have been instituted under the chapter in which it is found; it is not in the way, therefore, of an action in the nature of a creditor's bill for the purpose of having an assignment or other disposition of property by the judgment debtor declared fraudulent, &c. *Goodyear agt. Betts and Smith*, 187.

A party applying to have property in controversy placed in the hands of a receiver, pending the litigation, must show at least a probable interest in the property, and that there is danger of its being lost without such protection. *id.*

DEMURRER, A plaintiff can not demur to an answer, which does not purport to do more than deny some of the allegations of the complaint. *Thomas and Plumb agt. Harrop*, 57.

The answer must set up new matter constituting a defence and requiring a reply, to authorize a demurrer (*Code* § 153). *id.*

True construction, grammatical as well as legal, of § 153, gives a *demurrer* to an answer in all cases of *insufficiency*, whether it appears in a *denial* or in *new matter*. (*The cases upon this point reviewed and the question fully discussed*). *Salinger agt. Lusk*, 430.

The Code no where authorizes a general demurrer to a complaint. The intention of § 145 is to prohibit general demurrers; and it governs the form and manner of demurring, and applies to all the subdivisions of § 144. *Hinds agt. Tweddle and Darlington*, 278.

A demurrer which alleges "that several causes of action are improperly united in the complaint," is nothing but a *general demurrer*, and is, consequently, unauthorized. *id.*

Where no valid cause of action is alleged, it is fatal in every stage of the action in which the question can properly arise. *Noxon agt. Bentley*, 316.

A general demurrer for that ground is authorized by the Code (*see Hinds agt. Tweddle and Darlington, ante p.* 278; *and see the cases on both sides of this question, collected in Purdy agt. Carpenter*, 6 *How. Pr. R.* 361). *id.*

See *Dauchy agt. Bennett*, 375.

The argument of a demurrer is a trial. *Park agt. Carnley*, 354. *Roberts agt. Morrison*, 396

Digest.

DENIAL. See ANSWER, 171.

DISCOVERY, an application by petition may be so framed as to embrace a discovery under the Code, and the production of papers, under the rules. *Lovell agt. Clarke*, 158.

A defendant is entitled to an inspection and copy of an *assignment* of plaintiff's bond, declared on and made under an order of court, and also to a copy of the *order* to enable him to prepare for trial. *id.*

DISMISSAL, where the action is commenced by service of the summons without the complaint, and the plaintiff neglects to serve a copy of the complaint within twenty days after demand, it is proper for defendant to move to *dismiss the complaint*. If the motion is granted the action is dismissed. The motion is founded on § 274 of the Code. *Baker agt. Curtiss*, 478.

After notice of such a motion is served, and a copy of the complaint subsequently served on the defendant, the latter is not bound to return it immediately or be deemed to have waived the right to make his motion. *id.*

A dismissal of the complaint, founded upon service of notice of trial or hearing is irregular if obtained without placing the cause upon the calendar. *Browning and Hall agt. Page and Allen*, 487.

DISREGARDING PROCEEDINGS, An order of a justice of this court, staying proceedings twenty days, when served with the affidavit on which it was granted, though unaccompanied by a notice of motion, can not be treated as a *nullity*. The proper remedy is by motion to vacate or set aside the order. *Hempstead agt. Hempstead*, 8

When a pleading is regularly served and within the proper time, though defective, so that the only question is upon its *sufficiency*, it can not be disregarded as a nullity. *Strout and others agt. Curran*, 39.

See REFERENCE, 246.

DISMISSAL, 478.

DOCKETTING JUDGMENT, see JUDGMENT, 229.

DOWER, See COUNTER CLAIM, 303.

EJECTMENT, in an action under the Code to recover the possession of land, corresponding to the former action of ejectment, the death of a sole defendant abates the action, and it can not be continued, under § 121 of the Code, against his heirs at law, as his successors in interest. *Putnam agt. Van Buren and others*, 31.

If the heirs in such case be infants, and out of possession, and do not themselves ask to be substituted, *it seems* they could not be substituted

on the motion of the plaintiff, until they shall have had an opportunity to elect whether they will continue the action by being made parties, or abandon it. *id.*

EJECTMENT.

Where there are three claimants to a tract of land by titles hostile to each other, one of whom is in possession, and separate actions are brought against him by the others, which are prosecuted to judgment and execution, and the plaintiff in the first action is put into possession by the sheriff, the court will on his application, grant a perpetual stay of proceedings on the execution in the second action as against him. He is entitled to retain the possession thus acquired, until in an action against him a title superior to his is established. *The People agt. Lee*, 49.

EQUITABLE LIEN, see ASSIGNMENT, 375.

The mere fact that the plaintiffs furnished to the defendants money to purchase land, does not give them an equitable lien on such land for the money so advanced. Such lien only exists as between vendor and vendee, or those representing them. *Marquat agt. Marquat*, 417.

And where, as an inducement to the lending of such money, the defendants agreed to execute to the plaintiffs a mortgage on the lands purchased, *held*, that such promise was void by the statute of frauds. Such a contract, being for conveyance of an interest in lands, to be valid, must be in writing and subscribed by the party agreeing to execute the mortgage. *id.*

The advancing of the money by the plaintiffs in such case, is not such a part performance as will take the case out of the statute of frauds. *id.*

EQUITABLE AND LEGAL JURISDICTION, a court of law only provides a redress for wrong actually sustained. A court of equity grants a preventive within certain limits. The Supreme Court, in which the functions of both are joined, can not extend its power beyond what was possessed by the one or the other previous to the junction of the two. *Bouton agt. City of Brooklyn and Bryant* 198.

No court of law or equity can directly annul the proceedings of an inferior tribunal of a municipal corporation, unless they are regularly brought before it upon a certiorari or other appropriate process, addressed to the subordinate body. *id.*

The court will not, by the exercise of its powers in equity, even for purpose of removing an alleged cloud upon title, review the proceedings of subordinate tribunals of municipal corporations. *id.*

EVIDENCE, by the 399th section of the Code of 1851, the assignor of a thing in action shall not be admitted as a witness on behalf of any person deriving title through or from him, unless at least ten days notice of such intended examination of the assignor, specifying the

points upon which he is intended to be examined shall have been given, in writing to the adverse party, *Knickerbocker agt. Aldrich and others*, 1.

EVIDENCE, the requirement of ten days notice is general, and applies to all cases in which the "assignor is to be examined in behalf of the party deriving title through him." *id.*

See WITNESS.

Where testimony is offered, the relevancy of which can not be seen, and where it is not clearly on a cross-examination, it is the duty of the party who offers the evidence, when objected to, to point out some legitimate purpose for which he offers it, or the court may properly reject it *Adsit agt. Wilson*, 64.

The statements of officers of a plank road company, when not acting as agents, are not admissible as evidence. *Commissioners of Schræppel agt. Oswego Plank Road*, 94.

The declarations of a party can not be made evidence in his own favor, on the ground that they were made in a conversation, part of which is called out on a cross-examination by the other party. *Lynch agt. McBeth*, 113.

Parol evidence is inadmissible to vary the terms of an agreement, under seal, until it is shown that the sealed contract had been previously broken, rescinded, abandoned or had expired. *id.*

Where the return of the justice does not contain any legal evidence to support his judgment, the judgment should be reversed. *id.*

It seems, that on a summary proceeding to compel a party to support a relative (1 *R. S.* 614), the Court of Sessions is not bound to hear evidence offered to show that the indigent person has a plausible ground for an action, by reason of his farm having been obtained from him by fraud. *Haviland agt. White*, 154.

An admission of the facts constituting fraud, must prevail over a mere unexplained denial of fraudulent intention. *Dykers agt. Woodward and Hallam*, 313.

EXCEPTIONS, exceptions to a decision of the judge, filed after notice of the judgment, allowed to be incorporated into the record. The practice under § 268 of the Code considered. *Gilchrist agt. Stevenson*, 273.

See COURT OF APPEALS, 410.

EXECUTION.

See FRAUD, 12.

See EJECTMENT, 49.

A defendant in an execution, from whose property the sheriff has collected money sufficient for the payment of it is not liable for interest on the judgment while the money is stayed in the sheriff's hands at the instance of a creditor of the defendant. *Gray and others agt. Griswold*, 44.

Where a sheriff had two executions against the same defendant and

collected from his property sufficient to pay the first execution in full, and the other in part, and then another creditor of the defendant obtained an order of this court forbidding the sheriff to pay over the money until a decision of a motion to set aside proceedings, which was afterwards denied, it was held that the plaintiff in the first execution was not entitled to an order, that the sheriff apply thereon, of the moneys in his hands a sum sufficient to pay the interest on the amount directed to be collected, while the order was in force. *id.*

EXECUTION, when a sum was received by the sheriff sufficient to pay the first execution it was in law paid; and the balance in his hands the law at once appropriated upon the second execution, whereby it was paid *pro tanto*. *id.*

Before execution can be regularly issued to any county, the judgment should be docketed in such county. *It seems*, however, that an execution against personal property only, would not be irregular, though the judgment were not docketed in the county to which it was issued. *Stoutenburgh agt. Vandenburgh*, 229.

A judgment was perfected in Columbia county, and a transcript sent to the clerk, and execution (against both real and personal property) to the sheriff of Greene county, on the same day, but the execution was received one day before the transcript was docketed. *Held*, that the execution became operative in the hands of the sheriff from the time the judgment was actually docketed in Greene county, and took priority from that time. *Stoutenburgh agt. Vandenburgh*, 229.

See SHERIFF, 229, 375.

EXECUTORS, a petition of a creditor for an order of a surrogate requiring executors to render an account of their proceedings, is sufficient, if it state "that the applicant is a creditor of the deceased (naming him), and as such has claims against the estate of said deceased." The statute authorizing such application has reference exclusively to the *personal* estate of the deceased; it is not, therefore, absolutely necessary to specify, in terms, that the applicant has claims against the *personal* estate. *Wever agt. Marvin*, 182.

An individual named as executor in the will, but not in the letters testamentary, and never having appeared in the Surrogate Court and qualified, is by statute (2 *R. S.* 71, § 17) superseded, and has no power or authority whatever as executor. *id.*

The surrogate can not make an order that such an individual account as executor, although he may in some respects have acted as such. It is a question of *power*. *id.*

Where it appears that such an individual has in some matters, in relation to the estate acted as executor, such acts can not operate as an estoppel to the allegation of non executor, so as to give the surrogate power to call him to an account. The doctrine of estoppel *in pais* does not apply in such a case. *id.*

See COSTS, 208.

Digest.

FACT, see APPEAL, 64, 113.

FALSE AND SHAM ANSWERS, see ANSWER, 171, 483.

FALSE IMPRISONMENT, a complaint alleging a criminal offence on information and belief, *without stating any facts*, will give a justice of the peace *jurisdiction* to issue a warrant of arrest, although he grossly errs in exercising that jurisdiction. *Campbell agt. Ewalt and McKay*, 399.

Of course an action for false imprisonment in executing the warrant will not lie. (*This is adverse to Wilson agt. Robinson* 6 *How. Pr. R.* 110). *id.*

FICTITIOUS NAME, it is not allowable to a plaintiff to use a fictitious name at his discretion, but only when he is ignorant of the true name. *Crandall agt. Beach*, 271.

And see PARTNERS, 271.

FOREIGN CORPORATION, a foreign corporation is not authorized, either by the Revised Statutes or the Code, to sue another foreign corporation in the courts of this state, by attachment, unless the cause of action has arisen, or the subject of the action is situated within this state. *The Western Bank agt. The City Bank of Columbus*, 238.

Where a loan is made by one non-resident to another, out of this state, and secured by a draft drawn upon a person residing within this state, the cause of action can not be said to have arisen within this state. *id.*

FORCIBLE ENTRIES AND DETAINERS, proceedings on, 166, 441.

FRAUD, the plaintiffs sued the defendant by service of summons issued under the first subdivision of § 129 of the Code; which stated that if the defendant should fail to answer the complaint to be filed, the plaintiffs would take judgment for $333·41 with interest, &c.

The defendant not having any defence to such claim, suffered judgment by default. An execution was issued against his property and returned unsatisfied; when the plaintiffs proceeded to issue execution against his person. On examination of the complaint filed, the defendant found that it contained specific allegations of fraud, in the purchase of the property for which the debt was created.

Held, that the plaintiffs could not do that. They should have issued their summons under the *second* subdivision of § 129. *Field and Stone agt. Morse*, 12.

And further, that if the defendant had taken issue on the question of fraud, and it had been found in his favor, he would have been entitled to judgment. The plaintiffs could not have judgment for their debt, because the *gravamen* of the action was fraud. *id.*

Whether if the complaint had not contained any allegations of fraud, an execution might have issued against the person. *Quere?* *id.*

Digest.

FRAUDS, statute of.
See EQUITABLE LIEN, MORTGAGE, 417.

GUARDIAN, see HUSBAND & WIFE.

GUARANTY, In a suit upon a guaranty of *payment* of a note or bill of exchange, the neglect of the plaintiff to collect from the maker is no defence. *Noxon agt. Bentley*, 316.

If the complaint sets forth no good cause of action, the defendant is entitled to judgment, though his answer be demurred to and the demurrer sustained. *id.*

HIGHWAYS, where commissioners of highways refused to lay out a road, and an appeal was brought from that determination to the county judge, whereupon the referees appointed by the judge *reversed* the determination of the commissioners, and *ordered* the road to be laid out, but did not lay it out: *Held, that it was the duty of the referees and not of the commissioners to lay out the road*, that the Revised Statutes (1 *R. S.* 519, § 91), required this to be done upon the appeal, *by the judges*, and that the act of 1847, *p.* 584, § 8, makes it the duty of the referees to perform *the same acts*, and therefore a mandamus requiring the commissioners to lay out and open the road, can not be granted. *The People ex rel. Babcock agt. Commissioners of Plainfield*, 27.

Such commissioners have no jurisdiction to *lay out* a road after their refusal to do so has been reversed, although the order of reversal directs it to be done, nor have they jurisdiction to open and make the road after such reversal. *id.*

The "final determination" mentioned in the act of 1845, *p.* 186, § 13, can be none other than a determination *laying out a road*, as provided by the Revised Statutes, which determination is the only one that the commissioners can be required to carry out under the act of 1845. *id.*

A *mere reversal* of the order of the commissioners, is not an order to be carried out by the laying out of the road. The termini, the courses and distance, and the width of the road, must be determined by the referees, otherwise the commissioners have nothing to guide them in performing the duty of opening it. *id.*

Commissioners of highways are officers of limited and special jurisdiction. They can only act in *the cases and in the manner* pointed out by statute; and he who asks that their orders shall be executed, *must show* that the statutory requirements have been strictly pursued.

Digest.

HIGHWAYS.

Therefore, *held*, that any act done by them in the performance of their supposed duties, will not prevent them from taking the objection that the relator has *failed to show* that the statute under which they acted, had been strictly complied with. *id.*

By the terms of the Plank Road act, as amended in 1851, in relation to the location of toll gates, it requires, of this court, judgment of affirmance or reversal of an order appealed from the County Court. But it is within the province of the court to review the report and to order a *rehearing* before the referees, when there may have been any irregularity in their proceedings or in the admission of evidence. *Commissioners agt. Plank Road*, 94.

The evidence to be adduced before the referees must be pertinent and adapted to the nature of the proceeding. The statements of officers of the company *when not acting as agents*, are inadmissible (2 *R. S.* 40, § 80 and 81). *id.*

In order to remove a toll gate, the principal point to be established is, that the *public interest is prejudiced* in its present location. *id.*

HUSBAND AND WIFE, A married woman, living and cohabiting with her husband, purchased goods upon credit and moved them to her residence, where she carried on the millinery business in her own name; it was held that these goods were liable to an execution against her husband for his debt. *Lovett agt. Robinson and Witbeck*, 105.

It seems the 3d section of the act of 1848, as amended in 1849 (*L. of* 1849, *p.* 528), entitled an act for the more effectual protection of the property of married women, does not affect this case. *id.*

See JUDGMENT, 417.

Can a married woman, in consideration of one dollar, convey by deed to *her husband* all her *dower right* in the lands of her husband, under the act "for the more effectual protection of the property of married women," passed April 7, 1848, and amended in 1849? *Held*, that although the language of the act admits of such a construction, the legislature could hardly have intended so violent an innovation upon the existing law. *Graham agt. Van Wyck and others*, 373.

If a *feme covert* is not an infant, or lunatic, &c., no order for leave to sue by next friend, or for appointment of next friend is necessary. *Towner agt. Towner*, 387.

INJUNCTION, to entitle plaintiff to a temporary injunction, under § 216 of the Code, he must make a case, showing that the act complained of will *not only produce an injury to him, but that he is entitled to final relief by a perpetual injunction*. *Ward agt. Dewey*, 17.

See SHERIFFS SALE, 329.

Digest.

INJUNCTION.

Where a temporary injunction is allowed, and the complaint in the action is subsequently dismissed, the injunction *ipso facto* falls with it. Nor can an *appeal* restore the injunction. It can only be restored by a reversal of the judgment. *Hoyt agt. Carter*, 140.

But where an appeal has been taken from such judgment of dismissal the plaintiff can apply to the court, on notice, to restrain the proceedings of the defendant until the decision upon the appeal. The court by its original power over the parties is authorized to grant such an order. *id.*

Where a temporary injunction is sought under the 3d clause of § 219, the affidavit must show that the threats of the defendant to remove his property, &c., were made *during the pendency of the action;* and the complaint should contain a prayer for an injunction for that reason. The injunction order can not be sustained where it appears that the threats of the defendant were made *before* suit brought, and no demand in the complaint for an injunction. *Olsen agt. Smith*, 481.

INSOLVENT, a creditor may impeach the discharge of a debtor, obtained under the insolvent laws, for fraud; but he can not disregard it and issue execution on his judgment, and sustain the execution and levy by affidavits of the fraud. *Dresser agt. Shufeldt*, 85.

The court will not try the question of fraud on motion, but will set aside such an execution and leave the plaintiff to his action on the judgment; and will not allow the levy to be retained as security. *id.*

INSURANCE, Though a policy of insurance must state correctly *what* is insured (the subject matter), it is not necessary that the *particular interest in the property, or the reason why*, the party insures should also be expressed. *White agt. The Hudson River Insurance Company*, 341.

Where the plaintiff insured "$1500 on his brick building in Washington street, Brooklyn, and $1500 on his engine and boilers therein contained;" and it appeared that before the insurances one Gilbert owned the property in his own right, and assigned it to the plaintiff in trust to sell and pay the creditors of Gilbert, and the plaintiff was one of such creditors. *Held*, on demurrer, that the beneficial interest of the plaintiff covered the whole insurance, and entitled him to recover. *id.*

The directors of a Mutual Insurance Company in assessing the proportion of their losses to be paid by the maker of each deposit note, do not act judicially; if they omit to assess the deposit notes of any persons *then being* members, and liable for their proportion of the losses, the assessment is invalid. *The Herkimer Insurance Company agt. Fuller*, 210.

In making such assessment they have no right to take into consideration the length of time any person has been a member. *id.*

Digest.

IRREGULARITY, see ANSWER, 36.

Where a party means to treat a paper or proceeding irregular, as amounting to a nullity, he should not only give notice of such intention but point out the alleged irregularity. *The Broadway Bank agt. Danforth*, 264.

CONTRA, 478.

See ATTACHMENT, 329.

See MORTGAGE, 372.

JOINDER OF ACTIONS, a cause of action for the recovery of money, can not be joined with one for specific relief, even though they arise out of the same state of facts. (*Reversed, see post.*) *Cahoon agt. The Bank of Utica*, 134.

Misjoinder and duplicity do not depend upon the fact that two or more causes of action are *well* stated; all but one may be defectively and insufficiently stated and yet the pleading be double. *id.*

A complaint to compel the defendants to pay over a surplus of money received on a mortgage, given as collateral security for payment of certain promissory notes; and to require the delivery up of those notes, to be made available against third persons, for the plaintiff's benefit; *Held* not to contain two distinct causes of action. *Cahoon agt. The Bank of Utica*, 401.

The Code has not changed the common law rule of pleading, so as to deprive the party of the right to waive the tort and bring an action on the contract. *id.*

Where the plaintiff could have brought an action in tort against the defendants as bailees, but actually counted in assumpsit for a breach of the implied contract (*Humphrey's Precedents*, 622), *Held*, that there was no misjoinder of actions (tort and assumpsit) by such a count being connected with one admitted to be clearly in assumpsit. *Hinds agt. Tweddle and Darlington*, 278.

See PARTITION, 305.

JOINDER OF PARTIES, in actions where the defendant is not held to bail, several persons may be named in the summons, and the plaintiff may deliver a complaint against only the one upon whom the process is served, omitting the names of the other defendants mentioned in the summons. *Travis agt. Tobias*, 90.

A *motion to strike out* a codefendant, where the defendants are improperly joined in the action, is the proper remedy where the misjoinder is not apparent upon the face of the complaint. If apparent, a *demurrer* would be the remedy. *Bailey and Sheldon agt. Easterly and Easterly*, 495.

JOINT DEBTORS, see PARTNERS.

Digest.

JUDGMENT, see CONFESSION.

See PARTNERS, 100, 229.

Where a judgment was docketed correctly as to the christian and surname of the defendant; but incorrectly as to the initial of the middle name, and the docket was afterward corrected on motion, *held*, that the judgment took priority as a lien from the date of the original docketing, as against a subsequent judgment obtained before the correction. *Geller agt. Hoyt*, 265.

The county in which a motion should be made is not a question of *jurisdiction*. *id.*

Where one creditor has the first lien on two distinct securities, and another has a subsequent lien on only one of them, the latter has an equity to insist that the former should resort first to the security on which the latter has no lien. *id.*

Where defendant was served with summons, and subsequently with an order of arrest and copy complaint at the same time, but was discharged from the order because attending court as a witness; and no return of the service of the order or complaint having been made, and the defendant not having appeared a judgment entered by plaintiff for want of an answer twenty days from the service of the complaint, *held regular*. *Van Pelt agt. Boyer*, 325.

In an action on a contract to execute a mortgage, the plaintiff asking for a specific performance *or for such other or further relief, &c.*, and the court holding the contract void by the statute of frauds, the plaintiff can not have a judgment *in the same action* for the money advanced by plaintiff on such void contract (PARKER, J., *dissenting*). *Marquat agt. Marquat*, 417.

The practice applicable to such a case, before and since the adoption of the Code, reviewed and discussed. *id.*

See AMENDMENT, 265.

This court have full power, under § 173 of the Code, to order an amendment of a judgment record, as of the day the record was filed. And this question of amendment is between the plaintiff and defendant only. *Mann agt. Brooks*, 449.

JURISDICTION, in an action in the nature of a former creditor's bill, where the amount of the judgment which the plaintiff seeks to recover, or the matter in dispute is less than $100, the court have no jurisdiction; the complaint must be dismissed. *Shepard agt. Walker and Learned*, 46.

See EQUITABLE JURISDICTION, 198.

What county a motion should be made in, is not a question of *jurisdiction*. *Geller agt. Hoyt*, 265.

See ANSWER of TITLE. COURT OF APPEALS, 402, 404, 409.

See ATTACHMENT, 329.

See FALSE IMPRISONMENT, 399.

Digest.

JURORS, The public prosecutor on the trial of an indictment is not entitled to any peremptory challenge of jurors. *The People agt. Aichinson*, 241

What is meant by statutes being *in pari materia*. *id.* (*Waterford and Whitehall Turnpike vs. The People*, 9 *Barb. R.* 161, *dissented from.*)

JUSTICES COURTS, on appeal from a justice's judgment to the County Court, under § 366 of the Code, the latter court have no power or authority to reverse or affirm such judgment on *mere questions of fact* found by the evidence before the justice or a jury. Consequently this court can not, on appeal from the judgment of the County Court, review such evidence on mere questions of fact. *Adsit agt. Wilson*, 64

The law does not regard the judges as possessing any superior qualifications, over jurors, for judging of facts, or the weight or force of evidence of facts. It is a familiar and safe principle, that facts are to be tried by jury, and that the mere facts of a cause when once fully and fairly tried, are not to be reviewed. And this rule applies to the finding of facts by any tribunal having jurisdiction, such as referees, arbitrators and justices of the peace, &c. *id.*

The words "of fact" added to this section in 1851, do not increase the powers of the County Court over trials of fact in Justices Courts. The term "error of fact," does not refer to any error or mistake of the jury in finding the facts; it has a well settled legal meaning, which is quite different. *id.*

The Supreme Court exercises, on an appeal from a County Court in a cause originating in a Justice's Court, merely an appellate jurisdiction, and can review only decisions *actually made* by the County Court. *Lynch agt. McBeth*, 113.

Where the appeal is founded upon some irregularity or error not contained in the proceedings before the justice, such error must appear by the appellant's affidavit (*Code of* 1851, § 353). This statement and the respondent's counter affidavit are in such cases equivalent to an *assignment of errors of fact*. *id.*

See ANSWER OF TITLE.

LICENSE, the ordinances of the common council of New York city are not *public acts* in such sense that they can be noticed without being specially pleaded. *People agt. Mayor of the city of New York*, 81.

In an alternative mandamus the relator must set forth the *facts* on which he claims a right to relief. *id.*

The state laws in relation to the licensing of butchers, victualers, hackmen, stage drivers, &c. in the city of New York, are branches of the law for the good government of the city, not parts of a revenue system. The right to license is a power to be exercised by the mayor according to his judgment; he violates in refusing it, no *right* of an applicant, though the latter have complied with every condition of the statute. *id.*

Digest.

The same result arrived at, on a review of the city ordinances on the same subject. *id.*

LIEN, see JUDGMENT, EXECUTION, ATTACHMENT, PARTNERS, MORTGAGE.

LIEN LAW, in proceedings under the lien law, passed in 1851, applicable only to the counties of Westchester, Ulster and Putnam (*Session Laws of* 1851, *p.* 319), where the lien claimed (or a balance of account due the contractor) is less than $100, the notice, under § 4 of the act, should require the defendant to appear in a "*Justice's Court*" of the town where the building is situated. If the amount of the lien claimed is over $100, the notice should require the defendant to appear in the Supreme Court, at a circuit or special term, when in session in the county, specifying the day and hour. *Dresser agt. French*, 350.

Where the plaintiff summoned the defendant to appear in the Supreme Court before the *County Clerk* of Ulster, and claimed a balance of account of $53·40, although the original contract was over $100, and entered judgment by default against the defendant. *Held*, that all the plaintiff's proceedings were unauthorized and void. *id.*

The phraseology and construction of that act considered. *id.*

LIS PENDENS, in an action for the recovery of money, commenced by attachment, the plaintiff acquires no lien upon the land of the defendant by filing a notice of the pendency of the action. It is not an action affecting the title to real property within the meaning of section 132 of the Code. *Burkhardt agt. Sandford*, 329.

The filing of notice of pendency of the action, is in such a case a nullity. *id.*

The creditor's lien upon the property in such case attaches upon the *levy or seizure of the property by virtue of the warrant of attachment*, whether the property attached is real or personal property. *id.*

It seems, that in order to make the lien of an attachment upon real estate effectual as against bona fide purchasers or incumbrancers, it is necessary to file the notice prescribed by § 132 of the Code. *Learned agt. Vandenburgh*, 379.

MANDAMUS, see LICENSE, 81.

A mandamus will not be ordered at the suit of a person who has another appropriate and *adequate* remedy. *Coleman agt. Dikeman*, 124.

A mandamus is inappropriate, where there is a real and substantial dispute as to the title to an office. *id.*

The motion to quash a writ of mandamus is in the nature of a demurrer, and, *pro hoc vice*, admits the facts recited in the writ. *The People ex rel. Barnet agt. College of Physicians and Surgeons*, 90

Digest.

In doubtful cases the court will not determine on the motion whether the writ lies or not but let the mandamus go, that the matter may come before them on the return. *id.*

On an application for a mandamus the affidavit must be entitled. The 409th section of the Code does not affect proceedings upon mandamus. *People agt. Dikeman*, 124.

MARRIAGE PROMISE, an answer to a complaint for breach of marriage promise, can not set out in mitigation of damages, that between the alleged promise and breach, the plaintiff's conduct was improper, indecent and criminal, &c. Such facts can not now, any more than before the Code, be *pleaded*. *Smith agt. Waite*, 227.

If admissible in evidence at all, they may be proved without being pleaded. *id.*

MARRIED WOMEN, see HUSBAND AND WIFE.

MILITARY FINES, when a constable executes a warrant, issued and delivered to him by the colonel of the regiment for the collection of military fines, in so doing he acts *under the command* of an officer of the militia, and if prosecuted therefor and a judgment is given in the action against the plaintiff, the constable shall recover *treble costs*, under 1 *R. S.* 324, § 6. *Walker agt. Burnham*, 55.

MISJOINDER, see JOINDER.

where a summons has been served on only one of two defendants, who are severally as well as jointly liable, the plaintiff may proceed against the defendant served, as if he were a sole defendant; otherwise, if the defendants are liable jointly and not also severally. In the latter case the judgment must, in form, be entered against both defendants. *Stannard agt. Mattice*, 4.

Where several causes of action are improperly joined, the remedy is by demurrer and not by motion to set aside the complaint. *id.*

See *Travis agt. Tobias*, 90.

MISNOMER, *Misnomer* of defendants may be taken advantage of by motion to set aside the summons and complaint. It is doubtful whether under the Code there is a remedy in such case by answer. *Elliot agt. Hart*, 25.

See AMENDMENT, 265.
See FICTITIOUS NAME, 271.

MOTION, the Supreme Court has *jurisdiction* of a motion in any county. *Geller agt. Hoyt*, 265.

Costs of a motion can not be given to abide the event of the action. 455.

MOTION IN ARREST, *It seems*, that a motion in arrest of judgment may still be made, under the Code. *Noxon agt. Bentley*, 316.

Digest.

MORTGAGE, if a person who has, by agreement with the owner of land, an interest in a fallow, for the purpose of raising a crop of wheat—each to have one half—executes a chattel mortgage upon the fallow, the mortgage will bind the interest of the mortgagor in the fallow, and in the wheat afterwards put in under the agreement. *Shuart agt. Taylor*, 251.

Where the owner of a chattel mortgage brought an action of trover, before the Code, for a sale of the mortgaged property, made without his assent, before the mortgage money had become due, and when he had not taken possession, *Held*, that the action would lie. *id.*

A mortgagee of the chattel has the entire legal title thereto, subject only to be defeated by a performance of the condition of the mortgage, and is entitled to the possession immediately, when there is no provision in the instrument that the possession may be retained by mortgagor. *id.*

On a sale of lands, the terms were that promissory notes should be given by the purchaser; the vendor was not to give a deed until the notes were paid, and if any of the notes were unpaid at maturity, the vendor should, on due notice (as specified) resell the lots at the risk of the purchaser. *Held*, that the arrangement was in the nature of a mortgage for purchase money, and the purchaser was responsible for the deficiency after allowing what the lands produced on the resale. *Davis agt. Garr adm'r of Mitchell*, 311.

Leave to amend for the purpose of setting up such resale as a bar, refused. *id.*

Notice of sale by advertisement under a power given in a mortgage, was given to take place on the 7th of March, which was Sunday. Personal service of this notice was made on the 22d of February. The sale was postponed to the 15th March, and published three weeks, and personal service thereof made on the mortgagor on the 1st of March, *Held*, a valid sale. *Westgate agt. Handlin*, 372.

One day included and one excluded in these cases. *id.*

Notice of a postponement of a mortgage sale by advertisement need not be served personally. *id.*

In the city of New York a mortgagee acquires a *right* to redeem the premises as soon as they are *assessed* (for city purposes); and if he pays the amount of the assessment at any time before the expiration fixed by the statute he acquires a *lien* thereon, and may add the same to his mortgage debt and collect it by foreclosure. *Brevoort agt. Randolph*, 398.

Therefore a purchaser at an assessment sale must pay, or tender to the mortgagee the amount due on his mortgage and the amount paid by him in redemption of the property, in order to extinguish his lien. *id.*

A parol agreement to execute a mortgage of real estate to secure the repayment of money advanced for the purchase of the same property, is void by the statute of frauds. *Marquat agt. Marquat*, 417.

Digest.

MORTGAGE.

The advance of the money is not such a part performance as takes the case out of the operation of the statute. *id.*

NAME, see MISNOMER, 25.
See AMENDMENT, 265.
See FICTITIOUS NAME, 271.

NE EXEAT, Is the writ of *ne exeat* still in operative existence? *Held*, that it must be so considered, in order to accomplish the ends of justice in many cases, where no kind of substitute is given by the Code. It is not abolished by the Code in express terms, and its importance in a court of equity is too manifest to allow the belief that it was intended to be taken away by implication. (*This agrees with Forrest agt. Forrest*, 5 *How.* 125, *and* 10 *Barb.* 48; *and is adverse to Fuller agt. Emeric*, 2 *Sand. S. C. R.* 626). *Bushnell agt. Bushnell*, 389.

The Code in its practical operation briefly considered. *id.*

Where the writ of *ne exeat* was issued and served with the summons in the ordinary manner of issuing an injunction, *held*, sufficient. That is, it is not necessary to *file the complaint first*. *id.*

NEXT FRIEND, if a *feme covert* plaintiff is not an infant, or lunatic, &c., no order for leave to sue by next friend, or for appointment of next friend is necessary. *Towner agt. Towner*, 387.

NEW YORK CITY, see LICENSE, 81.
See MORTGAGE, 398.

NEW TRIAL, as the Code now stands (amendment of 1852) two modes of proceeding to obtain a review of a trial are prescribed. The one is applicable exclusively to trials by jury; the other to trials by the court or by referees. They are entirely distinct from each other. *Watson and another agt. Scriven and others*, 9.

In the case of a trial by jury, the review must first be had *before* judgment at the circuit or special term, for a new trial; and this decision may be reviewed on appeal at the general term. *id.*

In the case of a trial by the court or referees, either upon questions of fact or of law, no review can be had until *after* judgment, and then only upon appeal under § 348 of the Code. *id.*

Where a cause was referred and tried before the referee, who made a report therein which was set aside by this court, and a new trial ordered, with costs to abide the event, without further directions, and the same referee tried the cause again, after objections thereto on the part of the defendant, *it was held* that he had power to do so, and that the objection was properly overruled. *Shuart agt. Taylor*, 251

A report of a referee will not be set aside as contrary to the evidence, unless there is a decided preponderance of evidence against it. *id.*

Digest.

NOTICE, by the true construction of the 399th section of the Code of 1851, the assignor of a thing in action shall not be admitted as a witness on behalf of any person deriving title through or from him, unless at least ten days notice of such intended examination of the assignor, specifying the points upon which he is intended to be examined shall have been given in writing to the adverse party. *Knickerbacker agt. Aldrich and others*, 1.

The requirement of ten days notice is general, and applies to all cases in which "the assignor is to be examined in behalf of the party deriving title through him." *id.*

On appeal from a justice of the peace to the County Court, the Code, § 354, provides that "the affidavit and notice of appeal must within the *like time* (20 days), be served on the justice, and a notice of the appeal on the *respondent* personally, or by leaving it at his residence with some person of suitable age and discretion." *People agt. Eldridge and Lansing*, 108.

The question is this, whether the affidavit and notice of appeal being served on the *justice* within the twenty days, but *not on the respondent until after the twenty days has expired*, the appeal is perfected so as to give the County Court jurisdiction? Held not. *id.*

The service of the notice of appeal on the respondent within the time, is not merely a directory statute, it is *imperative*. The section requires that certain things shall be done within twenty days, and if they are not *all* done *there is no appeal*. *id.*

A *verbal* notice of appeal given to the respondent within the time amounts to nothing. It must be a notice in writing. *id.*

See IRREGULARITY, 36, 264, 478.
LIS PENDENS, 329, 379.
COSTS, 490.

NON-IMPRISONMENT LAW, see PARTNERS, 100.

OFFICE AND OFFICER, see PUBLIC OFFICER.

OFFER, under the 385th section of the Code, a plaintiff has *in all cases* of an offer of judgment by the defendant, ten days to elect whether he will accept it or proceed to trial. *Pomeroy agt. Hulin and Beebe*, 161.

If a defendant desires to avail himself of the provisions of this section, he must make his offer at such time that the plaintiff may also have the full benefit of the section; and if it is served so late that the cause is reached and tried before the expiration of the ten days, the rights of the parties are in all respects as if no offer had been made. *id.*

Where the plaintiff failed to obtain a more favorable judgment *in amount* than was offered by defendant, under § 385—but on the trial extin-

guished a set off, of the defendant, which, with the verdict, exceeded the defendant's offer. *Held*, that the plaintiff was entitled to *full costs*. *Ruggles agt. Fogg*, 324.

ORDER, see DISREGARDING PROCEEDINGS, 8.
REFERENCE, 246, 359.
PUBLICATION, 416.
STAY OF PROCEEDINGS, 490.

OVERSEERS OF THE POOR, the overseer of the poor can not incur for the county a liability beyond the sum of ten dollars, for relief in a single case, without the consent of one of the superintendents of the poor. *Gere agt. The Supervisors of Cayuga*, 255.

But with this restriction, his power of giving temporary relief is independent of the control of the superintendents of the poor. *id.*

PAPERS, see BOOKS AND PAPERS, PUBLIC OFFICE.

PARTIES, see EJECTMENT, 31.

A person not a party, but having an interest, can not be made a party to an action, under § 122 of the Code, where the action is on contract, express or implied, for the recovery of money. That section must be confined to actions for the recovery of "real or personal property," that is, for *specific* personal property. *Judd agt. Young*, 79.

Where in an action for slander the plaintiff obtained verdict and judgment, from which the defendant appealed to the general term, and pending the appeal the defendant died; on a motion to continue the action in the name of the personal representatives of the deceased defendant (*Code*, § 121) *Held*, that although it was not necessary in respect to the pending appeal, yet that the personal representatives should be allowed to be made parties in reference to a further appeal if they desired. *Miller agt. Gunn*, 159.

In case of a transfer of the interest of the plaintiff in the subject of the action, it is optional with the court, on the death of the plaintiff, whether or not to allow the assignee to be substituted and the action continued in his name; and on the application the defendant should be heard and his interests taken into account. *Sheldon and Phelps agt. Havens*, 268.

The representatives of a deceased plaintiff, who dies pending the action, have no right to elect whether it shall stand revived or not; the defendants are entitled to have the suit continued in the name of the plaintiff's representative. *Ridgeway agt. Bulkley and others*, 269.

The Code (§ 121) provides that an action may be continued by or against the representative of a deceased party, *on motion*, at any time within one year, or afterwards *on a supplemental complaint*; but is silent

as to the practice to be pursued when such supplemental complaint becomes necessary by the lapse of the year without revival. *Greene agt. Bates*, 296

Held, that the former practice in chancery must be regarded as furnishing a mode of proceeding in such a case. *id.*

The court accordingly ordered such supplemental complaint to be filed within thirty days, or that the complaint in the original suit be dismissed. *id.*

The claims of one defendant may be disputed by either of his codefendants as well as the plaintiff, and these claims may be tried and settled in a partition suit, if they involve interests in, or liens on the property sought to be partitioned. *Bogardus agt. Parker*, 305.

Practice on a supplemental bill to bring in as a party a newly appointed trustee. *Johnson agt. Snyder*, 395.

See JOINDER OF PARTIES, 90, 495.

PARTNERS, A obtains judgment against three partners, J, K and L, by service of process on K, alone, who allows judgment to be taken for a few dollars less than the amount claimed.

Held, that the defendants not served, could not be proceeded against by warrant, under the non imprisonment act, founded upon such judgment, even though they were shown to be in possession of partnership property, which they refuse to apply to the payment of the judgment. *Matter of Max Lowentein*, 100.

It is not, properly speaking, a judgment against the party not served, but, as to him, only against his interest in the joint property—against the *property*, not the *person*. *id.*

It is against the policy of the law to allow one member of a firm, by assignment or otherwise, to give a preference to creditors against the wishes of the other members of the firm. *id.*

A judgment by confession, without action, can only be entered against the person who signs the confession. One of two partners, or joint debtors, can not confess judgment for both. Such judgment is probably valid as against the party signing, but is void as against the other defendant, and can not be enforced against the joint property. *Stoutenburgh agt. Vandenburgh and Stoutenburgh*, 229.

In effect the party confessing such a judgment, makes the debt, by his confession, his individual debt. *id.*

Where after the confession of such a judgment by one partner, a suit was commenced and judgment *regularly* obtained against both on the same cause of action, and also upon a promissory note, not included in the former judgment, *Held*, on a question of priority of liens, that other judgment creditors could not avail themselves of the objections that a former recovery had been obtained and that the said note did not belong to the plaintiff. *id.*

Had the judgment been obtained by fraud or collusion, it would have been competent for them to have avoided it on that ground. *id.*

Digest.

PARTNERS,

Where an action is brought against two persons as partners under a particular firm name, for services rendered the firm, the summons which is served on one of the defendants only, who answers, denying the several allegations in the complaint, and the plaintiff proceeds in the action against both defendants under the statute, it is not sufficient to entitle the plaintiff to a verdict against both, to prove that the services were rendered for the firm, and that the defendant who has answered, was a member of it; but it must also be proved, as against that defendant, that the other defendant was also a member of the firm. *Crandall agt. Beach*, 271.

A verdict against the defendant served only, could not properly be rendered upon proof of the services for the firm, and that he was a member. *id*

If the name of the other member is not known, and a fictitious name is used to represent him, it must be shown who the copartner was, by some description; also that his name was not known to the plaintiff and that the name used is fictitious. *id.*

It is not allowable to a plaintiff to use a fictitious name at his discretion, but only when he is ignorant of the true name. *id.*

PARTITION, in a partition suit, the complaint is not bad for misjoinder of actions, because it sets up the claim of one of the defendants to a specific lien for moneys paid to extinguish liens on the premises sought to be partitioned, and asks for an account to be taken of such advances. *Bogardus agt Parker and others*, 305.

Creditors holding liens, simply as creditors, need not be made parties at the commencement of the suit. *id.*

PLACE OF TRIAL, where the action is local, and the complaint lays the venue out of the proper county, the defendant on showing that fact is entitled to an order changing the venue to the proper county, *Park agt. Carnley, sheriff*, 355.

And the plaintiff can not come in and oppose that motion upon the ground of convenience of witnesses. (*The case of Mason agt. Brown*, 6 *How. Pr. R.* 481, *considered as sui generis, and not applicable to ordinary motions of this kind.*) *id.*

In deciding motions to change the place of trial, courts now look beyond the affidavits of the parties and the advice of their counsel, to the pleadings and the issues to be tried; and from the whole case, as presented by the affidavits and the pleadings, determine in which county the trial will accommodate the greatest number of witnesses, whose attendance it will be necessary for the parties to secure in the reasonable exercise of care and prudence in preparing for trial. *King agt. Vanderbilt*, 385.

It does not follow as a matter of course, that the place of trial will be changed to the county where the greatest number of witnesses are shown to reside. If it appears that in such county the cause, in the

ordinary course of things, will not be likely to be reached and tried until after several circuits shall have been held, and that the greatest convenience will not be secured by such change, the motion will still be denied. *id.*

In determining such motions the convenience of witnesses is the main consideration, though the dispatch or the oppressive delay of suits are considerations not to be overlooked. *id.*

The place of trial of a transitory action should be in the county where the principal transactions between the parties occurred, unless the preponderance of witnesses is so great as to warrant the court to retain the place of trial in another county. *Goodrich agt. Vanderbilt and Drew*, 467.

It seems, that the objection to changing the place of trial to the city of New York, on account of the pressure of business in that city, may be obviated by granting an election to the parties to substitute an adjoining county, Kings, Richmond, Westchester or Rockland. *id.*

There is now no distinction between the terms *venue* and *place of trial*. A *demand* is not necessary before making a motion to change the place of trial for the convenience of witnesses, &c., under the 2d and 3d subdivisions of section 126. *Hinchman agt. Butler*. 462.

Such motion is more properly to be made after issue joined. Whether it may be made before, *quere*. *id.*

Very little reliance can be placed upon an allegation of the materiality of witnesses, unless it be shown wherein they are material. But the place of trial may be changed upon such an affidavit, when no witnesses are shown to reside in the county where the venue is laid. *People agt. Hayes*, 248.

PLANK ROAD LAW, the act for the incorporation of Plank Road Companies in reference to *appeals* from the decision of the County Court in the matter of changing the location of "toll gates," provides for the appointment by the Supreme Court, of referees to hear the appeal, to view the premises, &c.; and they are to proceed to a hearing *in the same manner as is provided by law and the rules and practice of the Supreme Court on references in civil actions;* and are to report their decision to the Supreme Court *as referees are required to report*, with the evidence taken by them, and the grounds of their decision.

The report may be reviewed by the Supreme Court, and judgment given thereon, "*and such judgment shall be final and conclusive.*"

Held, that no appeal lies to the Court of Appeals from the judgment of the Supreme Court. *McAllister agt. Albion Plank Road Co.* 301.

PLEADING, "subsequent pleading," in section 456 of the Code, means subsequent in the order of pleading. An amended complaint can not be called a subsequent pleading, when spoken of with reference to a previously served answer. *Hempstead agt. Hempstead*, 8.

Digest.

PLEADING.

An answer which denies on oath, that the defendant "has any knowledge or information sufficient to form a belief, that the payee endorsed and delivered the note to the plaintiff," intended to meet a corresponding allegation in the complaint, *is a material part of the issue;* and comes within one of the alternatives allowed by § 149 of the Code. *Sherman agt. Bushnell*, 171.

It can not be stricken out as *sham*, because it is sworn to, and there is no new matter set up. And besides, it is a mere denial of an allegation of the complaint, in a form allowed by the code. *id.*

An answer in slander which justifies the words alleged in the complaint, "she is a thief, and has stole my gold pen and pencil," may properly allege a variety of thefts of different articles by the plaintiff, other than those specified in the complaint. Why? Because they may be proved to show that the plaintiff *is* a thief, which is a distinct allegation in the complaint of actionable words. *Jaycocks agt. Ayres*, 215.

The words "as the plaintiff is informed and believes," where they occurred in the complaint (sworn to), *Held*, to be redundant, and were stricken out. *Truscott agt. Dole*, 221.

Allegations in a pleading should be *positively* made, in order to prevent immaterial issues and confusion. *id.*

The allegation of a fact, positively, in a pleading never, of itself, indicated that the party was *personally* cognizant of it. There was the same reason for inferring that he stated it on information, that there was for supposing that it was stated upon personal knowledge. *id.*

See MARRIAGE PROMISE, 227

See VERIFICATION *generally.*

Leave will not be given to amend a pleading for the purpose of setting up the defence of usury. *Bates agt. Voorhies*, 234.

See GUARANTY, 316.

See FALSE AND SHAM ANSWERS.

An unverified answer, consisting of denials only, may be stricken out as false. The power under the Code, extends to all answers or defences, whether they contain simply denials or new matter in avoidance. *Conklin and others agt. Vandervoort*, 48

An answer which merely denies the allegations of the complaint can not be amended under section 172. Why? Because there is no *new matter* in it requiring a reply or answer. *Plumb agt. Whipples*, 411.

The right to amend, where it exists, is not to "*prejudice the proceedings already had.*" *id.*

Where the plaintiff took an inquest on the second day of the circuit, and entered judgment thereon, the answer of the defendant not requiring a reply, and not having been verified, and no affidavit of merits filed, and the defendant amended his answer within time, but after the entry of judgment. *Held*, that the judgment was regular, allowing that the defendant had a right to amend. *id.*

Digest.

PLEADING.

An *answer* (verified) in slander which merely states that the defendant did not utter the precise words, at the precise time, *and* in the particular place *and* manner stated in the complaint, is not equivalent to the general issue as formerly understood. It is *insufficient* as containing a negative pregnant, and not controverting the allegations of the complaint separately and substantially. *Salinger agt. Lusk*, 430.

Where the plaintiff requires a verification he is entitled to have the answer drawn with legal certainty and precision. *id.*

It seems, that under the present Code allowing the principle of general denial, the court might sanction the *old form of pleading the general issue*. *id*

PROCEEDINGS SUPPLEMENTARY *to execution*, the judge who makes an order appointing a referee to examine as to the property of a judgment debtor under § 209 of the Code, is *the judge* to whom the referee must certify his examination, and the one who must make the order for the appointment of a receiver. *Smith agt. Johnson*, 39.

And this applies to county judges who make such orders. *id.*

PUBLIC OFFICE AND OFFICER, see COSTS, 55.

Where the right of one contesting an office is clear and unquestionable, and the possession of the official books and papers is all that is necessary to enable him to perform fully and satisfactorily the duties of his office, a resort should be had to the summary process given by the statute (1 *R. S.* 124). *People ex rel. &c. agt. Dikeman*, 124.

But where the title of the applicant is beyond a substantial dispute, and the possession of the books and papers would not give him the entire control of the office, and the remedy by the "action in place of *quo warranto*," would be so dilatory as to amount to a failure of justice, then the writ of mandamus should be awarded. *id.*

The case of The People vs. Steele (2 *Barb. S. C. Rep.* 398), not fully approved. *id.*

To give a justice of this court jurisdiction to grant an order, under the statute (1 *R. S.* 124, § 50, 51, 52, 53), to compel the delivery over of the books and papers of a public officer, the applicant must show a *regular judgment of ouster* in his favor. *Welch agt. Cook*, 173.

In an action brought by the Attorney General in the name of the People to try the right to a public office, his written stipulation made in the progress of the cause, binds the individual claiming the right to such office equally as if named a party, with the People. *id.*

Upon the rendition of a regular judgment of *ouster*, the officer becomes actually ousted and excluded from office; and the party declared to be entitled, upon taking the official oath and filing his bond, becomes *eo instanti* invested with the office, and entitled under § 437 of the Code, to demand and have the books and papers appertaining to the office *Welch agt. Cook*, 282.

Digest.

PUBLIC OFFICE AND OFFICER.

An application before a judge at chambers, under the 51st, 52d and 53d sections of 1 *R. S.* 125, and the 436th section of the Code, to compel the delivery over to the applicant of the books and papers appertaining to a public office, is not a motion *in the Supreme Court*, nor a motion *in any suit* pending in the court. Any justice, therefore, has jurisdiction. *id.*

Such proceedings can not be considered proceedings *in the court below*, where the judgment is appealed to the Court of Appeals; nor are they even proceedings *upon the judgment*, though the judgment is used as evidence of what it determines. They have no connection whatever with the proceedings in court, but are deemed by the statute original and independent proceedings. *id*

Consequently an *appeal* from the judgment of ouster can not in any way operate as a stay of proceedings on such an application. *id.*

An action against a public officer, sued for an act done by him by virtue of his office, must be tried in the county where the cause of action arose, unless changed for causes specified in the statute. And this is so, although the suit is brought by the people and prosecuted by the attorney general of the state. *People agt. Hayes*, 248.

In personal actions, sued by the attorney general, the king could sue in any county he pleased; and the people of this state have succeeded to the rights of the crown. But this rule has been here modified by statute. Regard, however, should still be had to the opinions of the attorney general and other public officers, acting for the state, as to what will be for the public interest. *id.*

Commissioners appointed by the act of the legislature, to lay out and build a road for the use of the public, are public officers. *id.*

An office is a public charge or employment; and every office is considered public, the duties of which concern the public. *id.*

A public officer who is liable to be sued for services rendered for the public at his request, may confess a judgment in his official capacity for the amount. *Gere agt. Supervisors of Cayuga County*, 255.

The supervisors of the county are, however, not concluded by the judgment; they have a right to go behind it and inquire whether the whole or any part of the cause of action was a county charge. *id.*

PUBLICATION, see SERVICE, 313.

Where an *order* for service of summons and complaint, by publication, has been made on its appearing *to the satisfaction* of the justice that the necessary facts were stated, the court, at special term, should not set aside such order for alleged irregularity, although they might think the evidence very slight upon which it was granted. *Roche agt. Ward*, 416.

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QUO WARRANTO, *People agt. Dyckman*, 124.

RECEIVER, see CREDITOR'S BILL.

RECORDS, a requisition made upon a register of deeds or county clerk "to search the records in their respective offices, and certify the title of A— B—, as it appears on and from said records, to certain pieces of land (describing them), and also to search and certify the incumbrances on said pieces of land," is sufficient to compel those officers, upon payment of their legal fees, to perform that duty so far as it concerns the title and incumbrances of A— B—. *Townshend agt. The Register of Deeds of New York*, 318.

If the applicant wishes for a further search he must make out a further requisition, and so on, as far as required. If, however, he wishes to avoid repeated requisition, he can first examine the records himself (free of charge) and frame a requisition so as to embrace the whole case at once. *id.*

Those officers have no authority to charge fees for a search which the party makes himself. The law allows none. *id.*

REDEMPTION, see SHERIFF'S SALE, 329, 375.

REFEREES AND REFERENCE, see NEW TRIAL, 9, 251.

The Code, § 276, provides that any issue, in any cause, may be *referred* upon the *written consent* of the parties. The 271st section authorizes the reference of certain specified issues. *Keator agt. Ulster and Delaware Plank Road*, 41.

The question is this, where counsel for both parties at the circuit agree orally to refer a cause not referable under § 271, and the court make the order and appoint the referee, who proceeds with the hearing, can either party set aside the reference because a *written consent* was not obtained? *Held*, not, because the agreement of the parties in the presence of the court, waived a written consent and made the reference valid and binding. They openly waived the right to a trial in in any other way; and the right having once gone, it could not be recovered. *id.*

In an action referable only by consent, a stipulation was signed by the attorneys of both parties referring the cause to Mr. M., and an order was made on defendant's notice, and on filing the stipulation referring it to Mr. L., *Held*, that the plaintiff had a right to disregard the order entirely and proceed to trial or inquest, as if no consent to any reference had been given. *Haner agt. Bliss*, 246.

The consent to refer, required by § 270 of the Code, may be written by the parties or their attorneys, or by the clerk entering such consent in the minutes of the court, or by the referees in their minutes, such consent being made before them. *Leaycroft agt. Fowler*, 269.

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REFEREES AND REFERENCE.

The parties also may waive by their acts any further writing than the entry on the minutes of the referee if more were otherwise necessary. *id.*

Where the necessity of examining a long account, depends upon the decision of another issue in the action, as whether a partnership existed, a reference will not be ordered until the issue has first been tried. *Graham agt. Golding and others*, 260.

An *order of reference* is not appealable to the general term. The sufficiency of the complaint as to its containing a cause of action is not necessarily determined by an order of reference in the cause. *Bryan agt. Brennon*, 359.

RELATIONSHIP, what relationship does not disqualify. *Albany Northern R. Road agt. Cramer*, 164. *Bank of Lansingburgh agt. McKie*, 360.

RELIEF, PRAYER FOR, see JUDGMENT, 417.

A feigned issue should not be directed upon a motion to set aside the judgment where the notice of motion merely asks (in addition to the principal motion) "for such further or other relief as the court may grant." *Mann agt. Brooks*, 449.

RELIGIOUS CORPORATION, a forfeiture of the charter of a corporation can not be alleged, nor the question of forfeiture considered upon a collateral proceeding. Even where the terms of the charter are that the corporation *shall be dissolved*, on the non performance of a condition, the mere failure to perform is not, *ipso facto*, a dissolution, but judicial proceedings, and a judgment of ouster must be had to effect a dissolution. *Matter of the Reformed Presbyterian Church of the city of New York*, 476.

Where a religious corporation, formed under the act of April 5th, 1813 (the general incorporating act), conveyed to individual members, lots in their burial ground, the deed running "to the party of the second part, his heirs and assigns for ever, to be used for the purpose of a burial place only," *it was held*, that this is a grant of the use of the lots as a place of burial, in subordination to the right of the corporation in the soil or freehold, and that the trustees have a right, upon complying with the provision of the statute, and by leave of court, to sell the property and remove the remains of the dead. *id.*

Provision should be made, in such case, to secure a proper place of burial for the remains disinterred. *id.*

REPLY, where a plaintiff elects to reply, he can not on a question of verification, deny that he was bound to reply; and can not allege as a reason that the answer does not set up a *counter claim*. What is a *counter claim*? *Roscoe agt. Maison*, 121.

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REVIVAL OF ACTION, in an action under the Code to recover the possession of land, corresponding to the former action of ejectment, the death of a sole defendant abates the action, and it can not be continued under § 121 of the Code against his heirs at law, as his successors in interest. *Putnam agt. Van Buren and others*, 31.

If the heirs in such case be infants, and out of possession, and do not themselves ask to be substituted, *it seems* they could not be substituted on the motion of the plaintiff, until they shall have had an opportunity to elect whether they will continue the action by being made parties, or abandon it. *id.*

The death of the party revokes the appointment of his attorney. The attorney of the ancestor does not become the attorney of the heirs, without a new appointment. *id.*

See PARTIES, 159, 269, 296.

RETURN, TO APPEAL, where a *return* to this court contained the *cases* made, upon which the first two verdicts upon the trials of the feigned issue ordered by the late Court of Chancery were set aside, new trials granted, and all the *evidence* embraced in those cases in addition to the case, evidence and bill of exceptions upon the third trial, in which a final decree was ordered—*Held*, that such a return should not be tolerated. To allow it, would sanction a precedent which sets all form and order at defiance. *Ferguson agt. Ferguson*, 217.

Where it appears that certain questions of law were actually and distinctly presented by exceptions taken at the trial, and were decided upon the bill of exceptions as settled at the general term of the court below, although said questions do not *sufficiently appear* by the said bill of exceptions, this court will, on motion, stay the argument of the cause, to give the appellant an opportunity to apply to the court below, at general term, for a settlement according to the facts. *Livingston agt. Miller*, 219.

SERVICE, see DISREGARDING PROCEEDINGS. See SHERIFF, 297.

The Code (§ 135) provides for the service of a summons on a non-resident defendant by an order and publication six weeks; and, "when the publication is ordered, *personal service* of a copy of the summons and complaint out of the state, is equivalent to publication." And section 137 declares that this species of service (by publication) "shall be deemed complete, at the expiration of the time prescribed by the order for publication."

Held, that the *twenty days* to answer, begins to run *from the day of the personal service*, out of the state, *Dykers agt. Woodward and Hallam*, 313.

SET OFF, see COUNTER CLAIM.

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SEVERANCE OF ACTIONS, where a summons has been served on only one of two defendants, who are severally as well as jointly liable, the plaintiff may proceed against the defendant served, as if he were a sole defendant; otherwise, if the defendants are liable jointly and not also severally. In the latter case the judgment must, in form, be entered against the defendants. *Stannard agt. Mattice*, 4

In actions where the defendant is not held to bail, several persons may be named in the summons, and the plaintiff may deliver a complaint against the one upon whom the process is served, omitting the names of the other defendants, mentioned in the summons. *Travis and others agt. Tobias and others.* 90.

See *Marquat agt. Marquat*, 417.

SHAM ANSWERS, an answer which denies that the defendant "has any knowledge or information sufficient to form a belief, that the payee endorsed and delivered the note to the plaintiff," to meet a corresponding allegation in the complaint, *is a material part of the issue;* and comes within one of the alternatives allowed by § 140 of the Code. It can not be stricken out as sham. *Sherman agt. Bushnell*, 171.

See PLEADING, 483.

SHERIFF, see EXECUTION, *generally.*

The return of a sheriff, or an affidavit of a person acting in his place, of the *service of a summons*, is not conclusive upon the defendant. He may be allowed to disprove it on a *motion* to set the proceedings aside. *Van Rensselaer agt. Chadwick*, 297.

SHERIFF'S SALE, where land has been sold upon execution and sheriffs' certificates given as required by statute, it is proper for the owner of the land sold, who claimed that such suit was illegal or did not confer a title upon the purchaser, to redeem the same from the effect of such sale, and obtain a temporary injunction to prevent the sheriff paying over the money to the purchaser of such land under the execution, and litigate with such purchaser for the money instead of the land. *Burkhardt agt. Sanford*, 329.

Where a judgment creditor has proceeded to sell under his judgment and take a sheriff's deed of premises, and thus secured the title of the mortgagor in a prior outstanding mortgage upon the premises, such purchaser is entitled to pay off and cancel such outstanding mortgage. But he is not entitled to an assignment from the mortgagee or his assignee in such case as a matter of course. The purchaser in such case is presumed to bid only to the value of the equity of redemption, and the premises in his hands become the primary fund in equity for the payment and satisfaction of such prior mortgage. To entitle a purchaser to an assignment under such circumstances, he must show affirmatively and clearly, that such assignment is necessary to protect such title or fund in his hands. *Dauchy agt. Bennett*, 375.

The rule seems to be otherwise before the sale, while the judgment is but a lien on the premises. The right to an assignment it seems, does not spring directly from the right of redemption, but from the necessity of the assignment to the protection or enforcement of some right in the redeeming party. *id.*

SLANDER, see REVIVAL, 159.
PLEADING, 215, 430.

STAY OF PROCEEDINGS, when there are three claimants to a tract of land by titles hostile to each other, one of whom is in possession, and separate actions are brought against him by the others, which are prosecuted to judgment and execution, and the plaintiff in the first action is put into possession by the sheriff, the court will, on his application, grant a perpetual stay of proceedings on the execution in the second action, as against him. *People agt. Lee*, 49.

An order of a justice made out of court, without notice, staying proceedings more than twenty days, is good for *twenty days only*. *Mitchell agt. Hall*, 490.

The best course is to make the first order *an order of the court*, which gives it vitality commensurate with the necessities of the case. *id.*

SUBPŒNA, a party to the action can not be compelled by service of a *subpœna duces tecum*, issued *ex parte*, without any order of the court or a judge, to produce his books and papers on the trial. *Trotter agt. Latson*, 261.

SUBSTITUTION, see ATTORNEYS, PARTIES.

SUMMONS, the plaintiffs sued the defendant by service of summons issued under the first subdivision of § 129 of the Code; which stated that if the defendant should fail to answer the complaint to be filed, the plaintiffs would take judgment for $333·41 with interest, &c.

The defendant not having any defence to such claim, suffered judgment by default. An execution was issued against his property and returned unsatisfied; when the plaintiffs proceeded to issue execution against his person. On examination of the complaint filed, the defendant found that it contained specific allegations of fraud, in the purchase of the property for which the debt was created.

Held, that the plaintiffs could not do that. They should have issued their summons under the *second* subdivision of § 129. *Field and Stone agt. Morse*, 12.

The cause of action as stated in the complaint, should control the form of the notice in the summons. *Voorhies agt. Scofield*, 51.

Where the plaintiff served a summons and complaint together, the summons containing a notice that if the defendant failed to answer

the complaint, the plaintiff would take judgment against him for $150, with interest, &c., the facts stated in the complaint showing a cause of action for wrongfully taking, detaining and converting personal property. *Held*, that the summons was irregular and was set aside with costs, with leave to amend on terms. *id.*

SUMMONS.

In an action arising on contract for the recovery of money, where the complaint seeks to vacate an agreement extending the time of payment, for fraud, and to obtain an immediate judgment for the whole demand, the plaintiff should insert in the summons, according to the 2d subdivision of § 129, *that if the defendant fails to answer, &c., the plaintiff will apply to the court for the relief demanded by the complaint. Travis agt. Tobias*, 90.

SUPPLEMENTARY PROCEEDINGS, The judge who makes an order appointing a referee to examine as to the property of a judgment debtor under § 209 of the Code, is *the judge* to whom the referee must certify his examination, and the one who must make the order for the appointment of a receiver. No other judge, out of court, has the power. *Smith and Fitch agt. Johnson*, 39.

The 299th section of the Code is confined in its operation to cases where proceedings supplementary to execution have been instituted under the chapter in which it is found; it is not in the way, therefore, of an action in the nature of a creditor's bill for the purpose of having an assignment or other disposition of property by the judgment debtor declared fraudulent, &c. *Goodyear agt. Betts and Smith*, 187.

A party applying to have property in controversy placed in the hands of a receiver, pending the litigation, must show at least a probable interest in the property, and that there is danger of its being lost without such protection. *id.*

SURETIES, *Sureties* in an undertaking can not raise the question of the liability of their principal to arrest. *Gregory and Foot agt. Levy and Sedgwick*, 37.

The Code has made no change in the law as to the liability of sureties. It points out the mode of exonerating them. But their responsibility after return of *non est* upon *ca. sa.* remains as formerly. *id.*

Bail in an action who have been excepted to and do not justify, can surrender the defendant to the sheriff.

It seems, that such surrender can be made by any one of the bail. *In Re Henry M. Taylor*, 212.

SURROGATE, *It seems*, that appeals from all decrees or sentences of surrogates should be first heard at *general term*.

Quere? Whether, under the statute, the power exists to hear such appeals by a justice at special term? *Wever agt. Marvin*, 182.

A petition of a creditor for an order of a surrogate requiring executors to render an account of their proceedings, is sufficient, if it state

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"that the applicant is a creditor of the deceased (naming him), and as such has claims against the estate of said deceased." The statute authorizing such application has reference exclusively to the *personal* estate of the deceased; it is not, therefore, absolutely necessary to specify, in terms, that the applicant has claims against the *personal* estate. *id.*

An individual named as executor in the will, but not in the letters testamentary, and never having appeared in the surrogate court and qualified, is by statute (2 *R. S.* 71, § 15), superseded, and has no power or authority whatever as executor. *id.*

The surrogate can not make an order that such an individual account as executor, although he may in some respects have acted as such. It is a question of *power*. *id.*

Where it appears that such an individual has in some matters, in relation to the estate acted as an executor, such acts can not operate as an estoppel to the allegation of non executor, so as to give the surrogate power to call him to an account. The doctrine of estoppel *in pais* does not apply in such a case. *id.*

TIME, see SERVICE, 313, 325.

TITLE, see ANSWER OF TITLE.

TORT, the Code has not changed the common law rule of pleading so as to deprive the party of the right to waive the tort and bring an action on the contract. *Hinds agt. Tweddle*, 278.

Where the plaintiff could have brought an action in tort against the defendants as bailees, but counted in contract, *held* no misjoinder by connecting such a count with one clearly in contract. *id.*

No authority is given by the Code to assign a *right of action*, which before was not assignable. *Hodgman agt. The Western Rail Road Co.*, 492.

A right of action for personal injuries received by a collision of cars upon a rail road is not assignable. The right to compensation or damages for such an injury can not be transferred. The action can only be maintained by the party who has been injured. *id.*

It is otherwise where the injury affects the *estate* of a party rather than the *person*. *id.*

TRIAL, see DEMURRER, PLACE OF TRIAL, NEW TRIAL.

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USURY, leave will not be given to amend a pleading for the purpose of setting up usury. *Bates agt. Voorhies*, 234.

See *Smedes agt. Wild*, 309.

VENUE, see PLACE OF TRIAL.

VERDICT, the verdict of a jury may be amended or corrected so as to conform to the facts, where there is no doubt as to such facts, either by certificate of the judge or otherwise, and of the real intentions of the jury. *Burhans agt. Tibbits*, 21.

Where, however, the slightest doubt exists as to what transpired on the trial, or if any exist, that the whole case has been disposed of by the court and jury, an amendment should not be allowed. *id.*

Where two issues were tried, one having been disposed of by the decision of the judge, and the other submitted to and passed upon by the jury, *Held*, that it being proper and the evident intention of the jury under the direction of the judge, to find upon both issues, in order to make a complete record, it was proper for the judge to allow an amendment of that kind. *id.*

VERIFICATION, where a party is not within the county in which the attorney resides, the attorney may verify a pleading, though the action or defence be not founded on a written instrument in possession of the attorney, and though all the material allegations of the pleading may not be within the personal knowledge of the attorney. But in such case the attorney must set forth in the affidavit of verification his knowledge, or the grounds of his belief on the subject, and the reasons why it is not made by the party. *Stannard agt. Mattice*, 4.

A defendant called upon to answer under oath may avail himself of the well settled doctrine, that no man is bound to accuse himself of any crime, or to furnish any evidence to convict himself thereof (*Const. art.* 1, § 6). *Thomas agt. Harrop*, 57.

Under § 157 of Code the *attorney* can verify a pleading (giving sufficient reasons) instead of the *party*, whenever the party is absent from the county where the attorney resides, and such absence is itself a sufficient reason. *Roscoe Executor &c. agt. Maison*, 121.

The present statutory affidavit (*Code.* § 157) does not necessarily imply that it appears in the pleading what matters are stated on personal knowledge and what on information and belief. *Truscott agt. Dole*, 221.

The effect and true construction of the oath, is, that so far as the matters in the pleading are within the knowledge of the party, they are true, and as to the residue he is either informed or believes them to be true. *id.*

What is a sufficient verification of a statement of confession of judgment. *Schoolcraft agt. Thompson*, 44

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WITNESS, by the 399th section of the Code of 1851, the assignor of a thing in action shall not be admitted as a witness on behalf of any person deriving title through or from him, unless at least ten days notice of such intended examination of the assignor, specifying the points upon which he is intended to be examined shall have been given in writing to the adverse party. *Knickerbocker agt. Aldrich and others*, 1.

The requirement of ten days notice is general, and applies to all cases in which "the assignor is to be examined in behalf of the party deriving title through him. *id.*

Now as before the Code, the travel fees of a witness, residing out of the state, must be estimated by the number of miles he travels from the boundary line of the state to the court. *Hinds agt. Schenectady County Insurance Co.* 142.

See SUBPŒNA 261.

A *stockholder* in a bank is not a "*party*" for whose immediate benefit the action is prosecuted or defended.

And this point necessarily decides another, that is, that a stockholder may be a legal *witness* for the bank.

Bank of Lansingburgh, agt. McKie, 360.

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